

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

GENERAL ORDER 23-5

October 19, 2023

**IN RE: 2023 AMENDMENT OF UNITED STATES
GUIDELINE AMENDMENTS §§ 4A1.1 AND 4C1.1**

**PROCEDURAL ORDER CONCERNING APPOINTMENT OF COUNSEL
AND MOTIONS FOR RETROACTIVE GUIDELINE APPLICATIONS**

To facilitate the identification and determination of eligibility of defendants who may qualify for relief pursuant to either the 2023 U.S. Sentencing Guidelines Amendment 821 of U.S.S.G. § 4A1.1 (addressing “status points” in the calculation of Criminal History Category) or § 4C1.1 (adding a downward adjustment for “zero-point offenders”) (effective November 1, 2023), it is hereby ordered:

1. The Office of the Federal Public Defender (“FPD”) for the District of Massachusetts 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 reduction of sentence in accordance with the 2023 United States Sentencing Guideline amendments referenced in this Order.
2. The U.S. Probation Office for the District of Massachusetts shall disclose to the FPD, upon request, the Presentence Report (“PSR”) of a defendant sentenced in the District for the purposes of determining the eligibility of that defendant for relief under U.S.S.G. § 4A1.1 or § 4C1.1, assigning counsel to the defendant, and where appropriate preparing motions for relief. The FPD may further disclose the PSR of a specific defendant to Criminal Justice Act (“CJA”) counsel who is appointed to

represent that defendant in accordance with the procedures below. In the alternative, any CJA counsel who is appointed in accordance with this Order may obtain the PSR directly from the Probation Office, subject to the restrictions and requirements of this Order. Any such request by the FPD or CJA counsel for disclosure of a PSR shall be made only if there is a good-faith basis for believing that the specific defendant is a potential candidate for relief under this Order.

3. Any PSR disclosed pursuant to this Order shall be used for the purposes of identifying potential candidates for early release, determining their eligibility, and, if appropriate, seeking such relief, and shall not be used for any other purpose. Any PSR disclosed pursuant to this Order shall not be redisclosed to anyone except as provided herein. The FPD shall store any PSRs for defendants whom it did not previously represent in a separate folder with access restricted to those working on the cases.
4. The Clerk's Office for the District of Massachusetts is authorized to disclose Statements of Reasons and Judgments to assigned counsel upon request for the purpose of determining a defendant's eligibility for relief under this Order. If a motion for relief is thereafter filed by counsel, the Clerk's Office for the District of Massachusetts is likewise authorized to disclose Statements of Reasons and Judgments to the United States Attorney's Office ("USAO") for the District of Massachusetts for the purpose of filing a response.
5. If the FPD determines that a defendant has a colorable claim for relief in accordance with the 2023 United States Sentencing Guideline amendments referenced in this Order, it shall take the following steps:

- a. In the case of a defendant who previously was found to be indigent and was represented by the FPD, the FPD is hereby appointed to represent the person to seek relief.
- b. 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 FPD will contact the CJA counsel and determine whether he or she wishes to provide further representation. If the CJA counsel is willing to represent the defendant, he or she shall file a motion to be appointed under 18 U.S.C. § 3006A(c) for seeking relief. If the CJA counsel is either unavailable or unwilling to undertake the representation, the FPD may either (1) undertake the representation or (2) assign the matter to another CJA counsel. Such assignment shall be made randomly to any CJA counsel (including members of the district court, appellate, and habeas panels) who has volunteered to handle such cases. Once assigned, CJA counsel shall file a motion to be appointed under 18 U.S.C. § 3006A(c) for purposes of seeking relief.
- c. If the FPD identifies a defendant who was not previously found to be indigent, but who now appears to be indigent, the FPD shall obtain a financial affidavit from the defendant, and submit the completed form, along with a motion to be appointed as counsel, to the Court. Alternatively, the FPD may proceed under the provisions of Paragraph 5(b) and assign the matter to CJA counsel, who shall be responsible for obtaining the requisite financial affidavit. No additional affidavit of indigency (CJA-23) shall be required unless the

defendant previously had retained counsel.

- d. If the FPD determines that there is a potential conflict of interest or other ethical issue precluding its involvement in the review of the eligibility of a particular defendant for relief under this Order, it shall promptly refer the case to CJA counsel to perform the review and obtain a financial affidavit if necessary.
6. The USAO shall promptly notify the FPD of any *pro se* filings seeking relief under the amendments to the United States Sentencing Guidelines referenced in this Order, and shall maintain a list of such filings.
 7. In any case of a *pro se* request for early release under the amendments to the United States Sentencing Guidelines referenced in this Order, the assigned judicial officer may refer the matter to the FPD for review pursuant to this Order; appoint the FPD or CJA counsel, as appropriate; or take such other action as may be appropriate under the circumstances.
 8. Within 21 days of the filing of the motion for relief under this Order, the parties shall confer with each other and the Probation Department and file a joint status report outlining the parties' position, including but not limited to:
 - a. Defendant's eligibility for reduction of sentence in accordance with the 2023 United States Sentencing Guideline amendments referenced in this Order;
 - b. A revised Guideline Calculation;
 - c. Recommendation(s) for sentencing;
 - d. Whether a hearing is necessary, and whether the defendant objects to appearing by video conference; and
 - e. The earliest projected release date based on the low end of the revised guideline

calculation.

9. The determination whether a particular defendant should be granted relief under the amendments to the United States Sentencing Guidelines referenced in this Order shall be made by the assigned judicial officer, and nothing in this Order is intended to supersede or otherwise affect the standards imposed by law for obtaining such relief.
10. If the FPD either (a) determines that no colorable claim exists or (b) refers the case to CJA counsel, the FPD shall promptly delete all electronic copies and destroy all paper copies of any PSR, Statement of Reasons, and/or Judgment it received for a defendant who it did not previously represent.
11. Nothing contained herein shall prevent any party from filing other motions it deems appropriate addressing reductions in sentence.
12. Although the Court is aware that the United States Sentencing Commission issued other amendments to the U.S. Sentencing Guidelines that become effective on November 1, 2023 (including but not limited to Amendment 814, amending § 1B1.13 regarding compassionate release, and Amendment 817, amending § 5C1.2 regarding the safety valve), this Order applies only to two enumerated changes in Amendment 821 as referenced in this Order.
13. This Order shall remain in place until further order of the Court.

So Ordered.



F. Dennis Saylor IV
Chief Judge, United States District Court