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**NEWSLETTER: FEDERAL AND STATE**  
**JUNE, 2021**

**I. THIRD CIRCUIT COURT OF APPEALS PROVIDES GUIDANCE TO  
INTERPRETATION OF SECTION 404 OF THE FIRST STEP ACT**

In *United States v. Murphy*, 2021 U.S. App. Lexis 15902 (3d Cir. 2021), the Third Circuit established two goalposts concerning the scope of a resentencing under Section 404(b) of the First Step Act of 2018, 132 Stat. 5194, 5222. Murphy's case is illustrative of how the Third Circuit treats a resentencing under the First Step Act, Section 404(b). Murphy was convicted after a jury trial of two counts: (1) conspiracy to distribute and possess with intent to distribute heroin and 50 grams or more of cocaine base under 21 U.S.C. 846, and (2) distribution of heroin and 50 grams or more of cocaine base under 21 U.S.C. 841(a)(1) and (b))(1)(A)(iii). Each count carried a minimum of ten years. The Probation Officer determined that Murphy was responsible for 595 grams of crack and 24 grams of heroin. It also determined that Murphy was a career offender. Probation calculated the guideline range as 360 months-Life. The district court imposed a 360-month sentence. In 2019, Murphy moved for resentencing under Section 404(b) of the First Step Act. Probation filed an addendum to the PSI report decreasing the guideline sentence to 262-327 months. Murphy disagreed with Probation. Murphy argued that he was no longer a career offender because his Maryland convictions for second degree assault were no longer career offender predicates under intervening Fourth Circuit precedent. *United States v. Royal*, 731 F3d 333, 342 (4th Cir. 2013). The district court overruled the objections and held that the First Step Act did not permit reconsideration of the career offender designation at resentencing. The district court imposed a sentence of 210 months. The Court held that at the resentencing, the district court must consider all 3553(a) factors anew. The district court must consider the career offender classification de novo. The district court also must consider prior determinations of drug quantity provided the facts changed. In other words, the district court applies the guidelines in effect on the date of the resentencing. The Court highlighted that sentence reductions under 18 U.S.C. 3582(c)(1)(B) permit the district court to reduce an imposed term of imprisonment to the extent otherwise permitted by statute. The statute authorizing the reduction is 404(b) which explicitly permits the district court to impose a sentence as if sections 2 and 3 of the Fair Sentencing Act applied. Section 404(b) authorizes the district court at the time of the resentencing to take changed circumstances into account.

## **II. COMMUTATIONS FOR PENNSYLVANIA PRISONERS**

State prisoners are eligible to apply for commutation of sentence, which means a reduction in sentence. Lifers can apply, and receive consideration. The application should be read by a competent professional. The application must contain a concise description of the crime. The application should be supported by letters from family and friends. The letters should be genuine and meaningful. They should offer real support; for example, housing, money, job, transportation, clothing. Letters should state why you are not a threat to public safety. The application will get a merits review by the Board of Pardons. Following favorable review, there will be an in-person hearing.

## **III. FEDERAL PRISONERS: COMPASSIONATE RELEASE AND MEANING OF EXTRAORDINARY AND COMPELLING CIRCUMSTANCES**

The First Step Act amended 18 U.S.C. 3582. In Section 603 of the Act, Congress amended 18 U.S.C. 3582(c)(1)(A) to permit defendants to file a motion with the sentencing court for modification of the sentence "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such request by the warden of the defendant's facility, whichever is earlier." The statute provides an opportunity to apply to the sentencing court for a sentence reduction based on extraordinary and compelling reasons. The motion must demonstrate extraordinary and compelling circumstances. Such circumstances include the Covid-19 virus, and the prison conditions spreading the virus, plus advanced age or some other recognized CDC threat from the virus. For instance, a prisoner who had had a heart attack won his release from a 360 month-sentence by providing documentation of the heart attack and the threat to his life from the prison conditions. Prisoners have won sentence reductions from the failure on the part of the First Step Act to make changes to 924(c)(1)(C) retroactive. At least one district court has held that 3582(c)(1)(A) can be used to reduce the very long sentences arising from stacking sentences for second or subsequent convictions for possession of a firearm during a drug trafficking offense before the first conviction became final.

## **IV. SCOPE OF PRACTICE**

My practice encompasses plea negotiations, sentencing consultation, sentencing, preparation of sentencing memoranda, disciplinary problems, parole representation, parole appeals, parole memoranda, 2241 habeas corpus petitions, presidential pardons and commutations, state pardons and commutations, 2254 habeas corpus petitions, and 2255 motions, direct appeals in all Circuits, U.S. Supreme Court practice, treaty transfers, convention transfers, derivative citizenship claims, removal (deportation) proceedings, civil commitments, and other immigration matters. Published cases include, but are not limited to, the following: *Harris v. Martin*, 834 F2d 361 (3d Cir. 1987), *United States v. Reshenberg*, 893 F2d 1333 (3d Cir. 1989), *United States v. Calabrese*, 942 F2d 218 (3d Cir. 1991), *United States v. Cole*, 813 F2d 43 (3d Cir. 1987), *United States v. Day*, 969 F2d 39 (3d Cir. 1992), *Farese v. Luther*, 953 F2d 49 (3d Cir. 1992), *Schiano v. Luther*, 954 F2d 910 (3d Cir. 1992), *United States v.*

Mathews, 11 F3d 583 (6th Cir. 1993), *United States v. Nanfro*, 64 F3d 98 (2d Cir. 2005), *United States v. Henson*, 948 F.Supp. 431 (MDPA 1996), *United States v. Miller*, 849 F2d 896 (4th Cir. 1988), *Phifer v. Warden*, 53 F3d 859 (7th Cir. 1995), *Prioleau v. United States*, 828 F.Supp. 261 (SDNY 1993), *United States v. Tiller*, 91 F3d 127 (3d Cir. 1996), *United States v. Amerman*, [2255 granted, sentence reduced] (EDPA 92-498-02) affirmed 14 F3d 49 (2000); *United States v. Eyer*, 113 F3d 470 (3d Cir. 1997); *United States v. Fields*, 113 F3d 313 (2d Cir.1997); *United States v. DePace*, 120 F3d 233 (11th Cir. 1997); *United States v. Derrick Williams*, 158 F3d 736 (3d Cir. 1998), *Paters v. United States*, 159 F3d 1043 (7<sup>th</sup> Cir. 1998); *United States v. Conhaim*, 160 F3d 893 (2d Cir. 1998); *United States v. DiPina*, 178 F3d 68 (1st Cir. 1999), *In re Weatherwax*, CTA3 No. 99-3550 [Hazel-Atlas independent action is not a second or successive 2255 motion], *Cullen v. United States*, 194 F3d 401 (2d Cir. 1999), *United States v. Almodovar*, 100 F.Supp. 2d 301 (EDPA 2000, Ludwig, J.) *Dabelko v. United States*, 211 F3d 1268 (6th Cir. 2000); *United States v. Carmichael*, 216 F3d 224 (2d Cir. 2000); *United States v. Williams*, 247 F3d 353 (2d Cir. 2001); *United States ex rel. Bryant v. Warden*, 50 Fed. Appx. 13 (2d Cir. 2002), *United States v. Peyton*, 12 Fed. Appx. 145 (4th Cir. 2001); *United States v. Smith*, 348 F3d 545 (6th Cir. 2003); *Blount v. United States*, 330 F.Supp.2d 493 (EDPA 2004); *Commonwealth v. Hanna*, 964 A2d 923 (PA Super. 2009). Important unpublished cases include: *United States v. Lopez*, 93-246-01 (EDPA, Hutton, J. ) [2255 granted]; *United States v. Garcia-Cintron*, 93CV1771 (EDPA, Gawthrop) [2255 granted, sentence reduced]; *United States v. Fazekas*, C.A. No. 94-1542 [WDPA, Diamond C.J.] [2255 motion granted, sentence reduced from 30 years to 10 years], *Henry Jones v. United States*, 2:90CV 4291 [DNJ, Sarokin, J. ] [2255 motion granted for ineffective assistance, prisoner released]; *Hearn v. United States*, CA. 93-464 [WDVA], [misclassification of methamphetamine, sentence reduced from 180 months to 90 months], *United States v. Richard H. Wilson*, 90 CRIM 69-01, 91 CIV 3326 [EDPA, Gawthrop] [2255 motion granted, actual innocence; immediate release], *United States v. Gevares*, 961 F.Supp. 192 (NDOH, ED 1996) [2255 granted; firearms sentence vacated; government motion to resentence denied], *United States v. Cross*, CTA6 No. 03-3562 (sentence vacated, and reduced on remand), *United States vs. Alexander*, C'TA3 No. 96-1696 [sentence reduced, and case remanded for hearing on distinction between cocaine base and crack cocaine], *United States v. Kostrick*, 103 F3d 114 (3d Cir. 1996) [848 vacated], *United States v. Michaels*, 2001 U.S. Dist. Lexis 191 15 (EDPA, Fullam, J.) [term of supervised release reduced], *United States v. Williams*, 146 Fed. Appx. 656 (2d Cir. 2002) [sentence vacated and reduced], *United States v. R. Thomas*, 273 Fed. Appx. 103 (2d Cir. 2008) [sentence vacated and reduced], *United States v. Matos*, 92 Cr 39-A (EDVA, Ellis, J. granted, sentence reduced), *United States v. Diaz*, Crim. No. 92-78-02 [EDPA] [sentence reduced for miscalculation of criminal history category], *United States v. Eberly*, 5 F3d 1491 (3d Cir. 1993) [2255 granted, sentence vacated], *United States v. Forde*, 92-429-A [ED VA, Hilton] [2255 granted, life sentence vacated; sentence reduced]; *United States v. Cruz-Pagan*, 91-006 [EDPA, life sentence vacated; sentence reduced], *United States v. Ostreicher*, 91 cv 3576 [EDNY, Weinstein, J.] [2255 motion vacated, special parole term vacated]; *United States v. S. Jones*, 22 F3d 304 (3d Cir. 1994) [2255 granted, sentence vacated]; *United States v. S. Jones*, 47 F3d 1162 (3d Cir. 1995) [2255 granted, sentence vacated, sentence reduced]; *United States ex rel. Maurice Roberts v. Warden*, 93-CV-1064 [NDNY] [Probation Department's imposition of restrictions on employment violated due process], *Darryl Pierce v. United States*, 89CR176 (MDPA, Rambo, J. ) [2255 granted in part, sentence reduced], *Baron v. United States*, 97CV290 [DUT] [2255 granted, sentence reduced and prisoner released]; *Simpkins v. United States*, 1999CR22 [NDWV, 2255 granted; failure to

properly file 851 special information; sentence reduced]; *United States v. Vernon*, 92-340-01 [EDPA, Dalzell, J.] [2255 granted, restitution order vacated and modified]; *United States v. Cora Love*, 92-504-16 [EDPA, Giles, C.J., 2255 motion granted, sentence reduced]; *United States v. Rosa*, 90-38 [DNJ][2255 granted; sentence reduced]; *United States v. Broadus*, 91 CR209, 97CV965 [MDNC, Tilley, J.] [2255 granted in part, sentence reduced by 20 years]; *United States v. Arevalo*, 94CR702, 97 CV 946 [SDFLA, Moreno, J.] [2255 granted, sentence reduced]; *United States v. H. Cruz*, 93CR341 [SDFLA, Highsmith, J.] [2255 granted, sentence reduced]; *Stocker v. Warden*, 2004 U.S. Dist. Lexis 5395 [EDPA, Giles, C.J. Habeas corpus granted based on actual innocence, sentence vacated], *Stovall v. Warden*, 2005 U.S. Dist. Lexis 6758 (EDPA Diamond)[2254 habeas granted in part restoring right to appeal]; *Pedretri v. United States*, 1996 U.S. Dist. Lexis 6315 (NDNY, McAvoy C.J. ) [2255 granted, sentence reduced]; *United States v. Boggi*, 1997 U.S. Dist. Lexis 14165 (EDPA 1997)[2255 granted, sentence reduced]; *United States ex rel. Shriner v. Warden*, 1:CV03-0481 (MDPA, Rambo, J.) [ [2241 habeas granted, sentence reduced], *Commonwealth v. Keeman Copeland*, [CP 9607-1215 1/3 Greenspan, J.] [PCRA granted based on ineffective assistance of trial and appellate counsel. Conviction for first degree murder vacated. Life sentence vacated], *Boyd v. Nish et al.*, 2007 U.S. Dist. Lexis 7176 (EDPA 2007, Tucker, J.) [Section 2254 habeas corpus granted to state prisoner based on ineffective assistance of trial counsel], *Dockery v. DiGuglielmo, et al.*, Civil No. 04-6025 (EDPA 2007, Buckwalter, habeas granted, sentence reduced), *Jones v. Piazza*, CTA3 No. 07-1868 (3d Cir. 2007)[reversed order denying habeas corpus under 28 U. S.C. 2254; remanded for resentencing, sentence reduced on remand], *Commonwealth vs. Charlton Pinnock* C.P. 8910-0148 [PCRA granted, sentence reduced, Keogh, CJ], *McKeever v. Warden*, 2005 U.S. Dist. Lexis 4714 (EDP A, Diamond, J. ) [2254 habeas granted, remanded to state for resentencing], *United States v. Futch*, CR. 402-232 [SDGA, Savannah Div.] [2255 granted, sentence reduced], *United States v. Danon*, Cr. 90-43 [DNJ, Lifland] [treaty transfer to Israel prior to completion of term of imprisonment], *Commonwealth v. Maurice Jones*, October Term, 1989, No. 0185-0187 [The Third Circuit Court of Appeals granted habeas corpus. Subsequently, the sentencing judge reduced the sentence], *United States v. Coleman*, 206 Fed. Appx. 80 (2d Cir. 2006) [remanded for resentencing, sentence reduced], *United States v. Wayne*, 2008 U.S. Dist. Lexis 52133 (WDPA 2008)[3582(c)(2) motion granted sentence reduced], *United States v. Fermin*, 277 Fed. Appx. 28 (2d Cir. 2008)[Sentence vacated and reduced], *United States v. Manigault*, 2010 U.S. App. Lexis 20350 (3d Cir. 2010)[sentence reduced pursuant to 18 USC 3582(c)(2) despite career offender classification], *Commonwealth v. Hanna*, 2009 PA Super. 3 (PA Super. 2009).[Vacated and remanded order denying expungement of criminal record], *In re: Fredrick Pereira* A 027 489 318: Removal order voided and petitioner allowed to remain in the United States] *United States v. Omar Mendoza*, 2009 U.S. Dist. Lexis 487205 2:05 CV 294 (NDTX, Amarillo) [2255 motion granted based on claim of ineffective assistance of trial counsel, sentence reduced to time served], *United States v. Johnson*, 2011 U.S. App. Lexis 5677 (3d Cir. 2011)[sentence reduced from 360 months to 222 months as a result of a 2255 motion], *United States v. Bruce Wayne Mohammed*, 94CR17 [WDPA, Cohill, J.][Two 3582(c)(2) motions granted, sentence reduced twice], *Commonwealth v. Cherry*, 2017 PA Super. 28 (PA Super. 2017), *Lambert v. SCI Warden*, Greene, 861 F3d 459 (3d Cir. 2017)[habeas granted], *Commonwealth v. Henkel*, 90 A3d 16 (PA Super. 2014) wherein the Superior Court refused to apply *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) to claim of ineffective assistance of trial counsel combined with ineffective assistance of PCRA counsel and then see *Henkel v. Gilmore*, 2015 U.S. Dist. Lexis 124341 (WDPA) [Martinez applied and

habeas granted], *Jeffries v. United States*, 1:15CV814, 1 Crim. 127-01 [MDNC, Schroeder, J. 2255 motion granted for ineffective assistance of trial counsel and ex post facto violation, sentence vacated], *Commonwealth v. Fulton*, 179 A3d 475 (PA 2018)[warrantless search of cell phone, all evidence suppressed, conviction and sentence vacated], *Commonwealth v. Poole*, 2018 PA Super Unpub. Lexis 934 (PA Super. 2018)[evidentiary hearing granted to determine the date critical witness recanted testimony not the date he considered recanting testimony], *United States v. Teddy Young*, Criminal No. 05-56-01, Civ. 10-6836 [Stengel, J. 2255 motion granted based on IAC, sentence reduced], See also *United States v. Young*, 588 Fed. Appx. 209 (3d Cir. 2015)[Reversed order denying 2255 evidentiary hearing], *Commonwealth v. Bickerstaff*, 204 A3d 988 (PA Super. 2019) (held trial counsel ineffective and vacated sentence), *Wade v. Monroe County District Attorney*, 2019 U.S. Dist. Lexis 79826 (MDPA 2019), *Commonwealth v. Blackson*, 2019 PA Super Unpub. Lexis 2235 (6/7/19), *Gaines v. Marsh*, 2021 U.S. Dist. Lexis 56372 (EDPA 2021. 3/24/21))

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