

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

United States of America,

Plaintiff,

v.

Case No. 15-20042-04-JWL

Nicholas L. Thomas,

Defendant.

MEMORANDUM AND ORDER

Defendant filed a pro se motion for a sentence correction pursuant to U.S.S.G. § 5K2.23 and a request for counsel (doc. 269). In December 2023, the court granted the government an extension of time to respond to the motion with an additional extension provided to defendant for his reply. Defendant then filed a motion indicating that he had never received the government's request for an extension of time and was having some difficulty receiving mail in a timely fashion. The court, then, extended the reply deadline again, noting that if no reply was received by the deadline, the court would seek confirmation from defendant that he had received the government's response before resolving the motion. Defendant's reply deadline has long passed and defendant has not filed a reply. Based on the court's prior order, then, an additional extension is appropriate for defendant to submit a reply. Moreover, the court now **grants** that aspect of defendant's motion in which he requests the appointment of counsel to assist him with the motion and the court appoints the Office of the Federal Public Defender to assist defendant with his reply brief.

In his motion, defendant seeks credit on his sentence for a state sentence that he had already served at the time his federal sentence commenced. According to defendant, the sentencing judge intended defendant to receive credit for the state sentence and ordered defendant's federal sentence to run concurrently with the state sentence when, in fact, the state sentence had already been completed. Defendant, then, requests a sentence modification consistent with what the judge and the parties intended at the time of sentencing. In the government's response, the government acknowledges that the sentencing court, counsel for the government and counsel for defendant all mistakenly believed at the time of sentencing that defendant was still serving the state sentence and all agreed that he should get credit for that sentence. Toward that end, the judgment in this case reflects that defendant's sentence was to run concurrently with the state sentence that, in fact, had already been completed. The government opposes defendant's motion based on its argument that Federal Rule of Criminal Procedure 36 does not apply in this circumstance.

In light of the unique factual circumstances here, the court will appoint the Office of the Federal Public Defender for the limited purpose of assessing whether defendant may be entitled to any relief and replying to the government's response. *See Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991) (When exercising its "broad discretion" to decide whether to appoint counsel to an indigent litigant, the district court "should consider a variety of factors, including the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims.").

IT IS THEREFORE ORDERED BY THE COURT THAT defendant's motion for a sentence correction pursuant to U.S.S.G. § 5K2.23 and a request for counsel (doc. 269) is **granted in part and retained under advisement in part.** It is **granted** to the extent defendant seeks the appointment of counsel and otherwise **remains under advisement.**

IT IS FURTHER ORDERED BY THE COURT THAT the Office of the Federal Public Defender is hereby appointed for the purpose of filing a reply brief in this case on or before **April 19, 2024.** The Clerk of the Court shall forward a copy of this order to the Office of the Federal Public Defender.

IT IS SO ORDERED.

Dated this 19th day of March, 2024, at Kansas City, Kansas.

s/John W. Lungstrum
HON. JOHN W. LUNGSTRUM
United States District Judge