

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY**

**IN RE: RETROACTIVE APPLICATION OF
 AMENDMENT 821 TO THE UNITED
 STATES SENTENCING GUIDELINES**

**GENERAL ORDER
NO. 23-14**

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Before the Court is the United States Sentencing Commission’s (“Commission”) retroactive application of Parts A and B, Subpart 1, of Amendment 821. *See* U.S.S.G. App. C., amend. No. 825; U.S.S.G. §1B1.10, p.s. (eff. Nov. 1, 2023). Part A of the amendment addresses guideline §4A1.1 status points, decreasing them by one point for individuals with seven or more criminal history points and eliminating status points for those with six or fewer criminal history points. Subpart 1 of Part B creates a new §4C1.1 guideline that provides a decrease of two offense levels for “Zero-Point Offenders” (no criminal history points) whose offense did not involve specified aggravating factors.

In the interest of applying the retroactive amendment fairly, expeditiously, and without undue expenditure of judicial resources, the Court has established procedures to, *sua sponte*, review the sentences of currently incarcerated individuals whom the Commission, or the U.S. Probation Office, has identified as being potentially eligible for a modification in their term of imprisonment under Amendment 821. The Court has additionally established the procedures set forth herein for reviewing motions filed by currently incarcerated individuals requesting a modification in their imposed term of imprisonment pursuant to Amendment 821.

I. Appointment of Counsel

Pursuant to the Criminal Justice Act, 18 U.S.C. §§ 3006A(a)(1) and (c), the Office of the Western Kentucky Federal Community Defender (“Federal Public Defender”) is hereby appointed to represent any defendant convicted in this District, who was previously determined to have been entitled to appointment of counsel or who is now indigent, to determine whether the defendant is eligible for a reduction of sentence and to seek relief in accordance with 18 U.S.C. § 3582(c)(2) and the 2023 Criminal History Amendments to the Sentencing Guidelines, Part A (Status Points under § 4A1.1) and Part B (Zero-Point Offenders), made retroactive by Amendment 821.

Should the Federal Public Defender conclude that it cannot undertake the representation described in this Order, whether due to conflict or capacity, it shall so inform the Clerk’s office and a member of the Criminal Justice Act Panel shall be appointed to represent the defendant.

II. Defendants Identified by the Commission or Probation as Being Potentially Eligible for a Modification of an Imposed Term of Imprisonment under Amendment 821

The Commission has provided the Court with two lists of individuals who were sentenced in the Western District of Kentucky and who appear to be eligible for a reduced sentence. One list concerns defendants identified by the Commission as being potentially eligible for a modification of sentence pursuant to Part A of Amendment 821, which relates to individuals assigned status points under USSG § 4A1.1(d) when originally sentenced. The second list concerns defendants identified by the Commission as being potentially eligible for a modification of sentence pursuant to Part B of the Amendment, relating to individuals with zero criminal history points. The U.S. Probation Office for the Western District of Kentucky (“Probation”) shall supplement these lists, if necessary, by generating a report from the PACTS database of any additional defendants who

were assigned zero total criminal history points, or (2) who received criminal history points under U.S.S.G. § 4A1.1(d), and who are still incarcerated.

The Court shall review the lists of cases provided to it by the Commission, as supplemented by Probation, beginning with those cases of defendants closest to release or eligibility for release. For each such case, Probation shall prepare and provide the Court with a Memorandum that includes (1) the former guideline calculation and range; (2) the amended guideline calculation or criminal history category and range; and (3) a recommended recalculated sentence or a recommendation that the defendant is ineligible for a reduced sentence. For any defendant who is charged with a violation of supervised release, Probation shall reference in its Memorandum the criminal history category in effect at the time of the initial sentence and shall indicate if the defendant had status points that contributed to the criminal history category calculation and what the criminal history category would be considering the retroactive Application of Part A of Amendment 821.

Probation shall provide the original sentencing judge or, if not available, the judge to whom the case has been reassigned with a copy of the above-referenced Memorandum along with the original presentence report, the original judgment, the original statement of reasons, and, if applicable, any previously filed memoranda of recalculation and previously entered order reducing sentence.

The Court shall review, approve, or revise each recommendation from Probation and enter a text order setting forth the following deadlines:

- A. Probation's Memorandum.** Probation shall, within five (5) days of the order, electronically file in CM/ECF its Memorandum, a copy of which shall be released to both defense counsel and to the United States Attorney's Office.

B. United States Attorney's Office Response. The United States Attorney's Office shall file its response to Probation's Memorandum within fourteen (14) days from the date the Memorandum is filed. If the United States Attorney's Office does not oppose Probation's recommendation, it will file a submission so indicating. Each response shall include information regarding any history of disciplinary action related to the defendant and address any public safety concerns related to his or her release.

C. Defense Reply. Defense counsel may file a reply within fourteen (14) days following service of the United States Attorney's Office response. If defense counsel does not oppose either Probation's recommendation or the United States Attorney's Office response, it shall file a submission so indicating and the Court may take the matter immediately under advisement.

III. *Pro Se* Motions

It is anticipated that the Court will receive requests for reduced sentences from *pro se* defendants. These requests may take a variety of forms with some being correctly labeled as motions to reduce sentence, while others may arrive as letters to the Clerk's office or to chambers requesting a sentence reduction or general information on the applicability of Amendment 821 to their case.

Any motion filed by or on behalf of any defendant who has been identified by the Commission or Probation as being potentially eligible for a modification of an imposed term of imprisonment under Amendment 821 shall be denied without prejudice as the Court will consider whether such defendant is eligible for a modified sentence in accordance with the procedure set forth in Section II of this General Order.

Pro se correspondence submitted by defendants who have not been identified by the Commission or Probation as being potentially eligible for a modified sentence under Amendment 821 and that is deemed a motion to reduce sentence will be filed and the Federal Public Defender's Office will receive electronic notice. The Federal Public Defender's Office will then determine whether to represent the defendant in connection with the motion for a sentence reduction.

For those cases in which the Federal Public Defender decides to represent a defendant, the Federal Public Defender's Office will file a Notice of Appearance and may file supplemental papers in support of the motion. The Court shall thereupon enter the text order referenced in Section II above.

If the Federal Public Defender's Office decides not to represent the defendant, it will send the individual a letter indicating that his or her representation will not be undertaken and that he or she may continue *pro se* or retain an attorney to do so. The Federal Public Defender's Office will also advise the Court, Probation, and the United States Attorney's Office that it will not be representing the defendant. In such instances, the Court shall review the *pro se* motion and may either enter the text order referenced in Section II above or may direct Probation to submit to chambers a proposed order, using form AO 274, that sets forth the reasons for denial of the motion for the judge's consideration and signature without requiring Probation to file a Memorandum or the U.S. Attorney's Office to file a response.

Pro se correspondence that is not deemed a motion will be forwarded to the Federal Public Defender's Office. If the Federal Public Defender's Office decides to represent the defendant, it shall file a motion to reduce sentence on that individual's behalf and the case will proceed according to the procedure outlined above. If the Federal Public Defender's

Office decides not to represent the defendant, it will send the individual a letter indicating that representation will not be undertaken and that he or she may file a motion to reduce sentence *pro se* or retain an attorney to do so.

IV. Motions Filed by Retained Counsel

If a motion is filed on behalf of a defendant by an attorney other than the Federal Public Defender's Office, the procedure outlined in Section II above shall be followed.

V. Generally Applicable Procedures

- A. Notice of Electronic Filing.** Once a motion to reduce sentence is filed, the Clerk's Office shall automatically transmit a Notice of Electronic Filing (NEF) to the judge assigned to the case, Probation, the United States Attorney's Office, and the Federal Public Defender's Office. Each of these offices is responsible for designating the particular individual(s) who shall receive the NEF.
- B. Access to Criminal Case Documents.** The Court authorizes Probation to disclose Presentence Investigation Reports and Judgement and Commitment Orders to the Federal Public Defender, CJA counsel, or privately retained counsel. Probation is authorized to provide the Federal Public Defender a complete list, generated by Probation from the PACTS database, of all known defendants who (1) were assigned zero total criminal history points, or (2) received criminal history points under U.S.S.G. § 4A1.1(d), and who are still incarcerated.
- C. Decision.** In making a determination whether to reduce a defendant's sentence, § 1B1.10, Application Note 1(B)(ii) provides that the Court *must* consider: (1) the factors set forth in 18 U.S.C. § 3553(a) and (2) the nature and seriousness of the


danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment. The Court may also consider defendant's post-sentencing conduct, *i.e.*, his behavior in prison. Except for a sentence resulting from a downward departure pursuant to a government motion for substantial assistance, the Court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) to a term that is less than the minimum of the new amended guideline range. See U.S.S.G. § 1B1.10(b)(2)(A). When a defendant received a sentence that was below the guideline range because of a government motion based on substantial assistance, the court may grant a reduction that is comparably less than the new amended guideline range. One further restriction is that the reduced term of imprisonment cannot be less than the term of imprisonment the defendant has already served. See U.S.S.G. § 1B1.10(b)(2)(C). If a "time served" order is signed before February 1, 2024, the order should explicitly state that it is effective February 1, 2024.


D. Form of Decision. Unless the presiding judge determines that a written decision is required, motions will be resolved using form AO 247 (Order Regarding Motion for Sentence Reduction). The presiding judge shall issue a text order, indicating whether the motion is granted or denied. If the motion is granted, the text order will also reflect the extent to which the sentence should be reduced. Probation will prepare the draft AO 247 and forward the same to the presiding judge. Once the AO 247 is filed, Probation shall provide copies of it to the Bureau of Prisons and the Commission as soon as possible. In those cases where the presiding judge determines that a written decision is required, a form AO 247 will still be utilized—

but the written decision will either be issued and then the AO 247 will be filed, or the written decision may be attached to the AO 247.

E. Case Reassignment. If the presiding judge in the original proceeding is no longer serving as a judge in this District, the Clerk is directed to reassign the case in the manner provided in General Order 23-10 for assigning new criminal actions.

DATED: November 9, 2023


Greg N. Stivers, Chief Judge
United States District Court

ENTERED
JAMES J. VILT JR., CLERK
11/9/2023

U.S. DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY