

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

IN RE: USSG PART A AND PART B,
SUBPART 1 OF AMENDMENT 821

MISC. NO. 23-mc-565 (RAM)

PETITIONS FOR SENTENCING
REDUCTION BASED ON THE
AMENDMENTS TO THE GUIDELINES FOR
CRIMINAL HISTORY MADE
RETROACTIVE BY THE UNITED STATES
SENTENCING COMMISSION AND
EFFECTIVE NOVEMBER 1, 2023.

ADMINISTRATIVE DIRECTIVE REGARDING AMENDMENT 821

I. Introduction

On April 27, 2023, the United States Sentencing Commission ("USSC") submitted to Congress an amendment to the United States Sentencing Guidelines ("Amendment 821") that would revise how a defendant's criminal history category is computed. As relevant to this directive, Part A of Amendment 821 revises section 4A1.1 of the Sentencing Guidelines to limit the overall criminal history impact of "Status Points," which are the additional criminal history points given to defendants if they committed the instant offense while under a criminal justice sentence. Part B, Subpart 1 of Amendment 821 creates a new Chapter Four guideline at section 4C1.1 to provide a decrease of two levels for "Zero-Point Offenders"—defendants who have no criminal history points—whose offense did not involve specific aggravating factors. Amendment 821

was prompted in part by the USSC's examination of data regarding the predictive value of status points and the lower recidivism rates of offenders with zero criminal history points.

Subsequently, on August 24, 2023, the USSC approved by majority vote to make Part A and Part B, Subpart 1 of Amendment 821 retroactive effective November 1, 2023. The USSC did so pursuant to its authority under 28 U.S.C. § 994(u), regarding Sentencing Guidelines amendments that may be considered for retroactive application. In other words, the USSC voted to make the amendments to criminal history category computations applicable in a retroactive fashion to defendants who are currently serving a term of imprisonment.

Congress approved the USSC's recommendation on November 1, 2023.

The present directive is intended to set forth a plan under which the United States District Court for the District of Puerto Rico ("District Court") will handle the hundreds of petitions that are expected to be filed by defendants pursuant to the retroactive amendment. While this directive is intended to be as inclusive as possible, the District Court also understands that the process of applying retroactive amendments to the Sentencing Guidelines is a fluid one that needs to be grounded in principles of flexibility and cooperation among the parties involved, including but not limited to the United States Probation Office ("USPO"), the United

States Attorney's Office ("USAO"), the Federal Public Defender's Office ("FPDO"), and other defense counsel. Accordingly, this directive sets forth an outline of the guiding principles that will be followed in processing the reduction of sentence petitions. Nothing in this directive is intended to confer individual rights to litigants, nor limit the discretion of individual judicial officers.

II. Relevant Statutory Provisions and Eligibility

It must be first noted that the fact that the USSC has made Part A and Part B, Subpart 1 of Amendment 821 retroactive does not make a sentencing reduction automatic. There are eligibility requirements that are discussed below. Moreover, even if a particular defendant is eligible, the decision to grant the requested reduction of sentence remains subject to the sound discretion of judicial officers who shall consider the facts and circumstances of the individual cases as well as the safety of the community and other relevant factors.¹ With that clarification, the Court discusses the relevant statutory provisions involved in the process.

As a general matter, "'a judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may

¹ The USPO remains responsible for providing the court hearing the petition, in such exceptional cases, with relevant information and assessment without being limited by the parties' stipulations or arguments.

not be modified [] except in limited circumstances.” Dillon v. United States, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. § 3582(b)) (first alteration in original). However, 18 U.S.C. § 3582(c)(2) provides one “exception to the general rule of finality.” Id. Specifically, it provides that:

in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). The USSC is directed by Congress to periodically review and revise the Sentencing Guidelines in consultation with representatives from the United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders. See 28 U.S.C. § 994(o).

Further, “[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.” 28 U.S.C. § 994(u).

Such specifications are located at U.S.S.G. § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)). The policy statement establishes that:

[i]n a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

U.S.S.G. § 1B1.10(a)(1). There are two initial requirements for a sentence reduction authorized under 18 U.S.C. § 3582(c)(2) and consistent with the policy statement. U.S.S.G. § 1B1.10(a)(2). First, there must be an amendment listed in subsection (d) of the policy statement that is applicable to the defendant. U.S.S.G. § 1B1.10(a)(2)(A). Second, the amendment must have the effect of lowering the defendant's applicable guideline range. U.S.S.G. § 1B1.10(a)(2)(B). Notably, **proceedings for a sentencing reduction under 18 U.S.C. § 3582(c)(2) and the policy statement "do not constitute a full resentencing of the defendant."** U.S.S.G. § 1B1.10(a)(3).

To determine whether a particular defendant is eligible for a sentencing reduction and the extent of any such reduction, the court hearing the petition hearing the petition:

Shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

U.S.S.G. § 1B1.10(b)(1). As outlined above, there are limits on the sentencing court's authority to reduce a term of imprisonment. Barring cases involving substantial assistance², U.S.S.G. § 1B1.1(b)(2)(B), the court cannot reduce the sentence to a term of imprisonment that is "less than the minimum of the amended guideline range." U.S.S.G. § 1B1.1(b)(2)(A)-(B). "In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served." U.S.S.G. § 1B1.1(b)(2)(C).³

The policy statement found at U.S.S.G. § 1B1.10 is binding on district courts; accordingly, proceedings under 18 U.S.C.

² For defendants who rendered substantial assistance and subsequently received a sentence below the applicable guideline range, "a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate." U.S.S.G. § 1B1.10(b)(2)(B). In this District, under the 2007 and 2010 retroactive amendments to the cocaine base guidelines and the 2014 retroactive amendment to the drug quantity table guidelines, the practice was to reduce the term of imprisonment under the newly calculated range based on the same percentage of reduction the defendant received for substantial assistance to the originally calculated range.

³ The USPO shall certify the terms of imprisonment served by the particular petitioner.

§ 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005). See Dillon, 560 U.S. at 828. Judicial officers are therefore precluded from entertaining arguments for sentences that are below the amended guidelines range in the context of section 3582(c)(2). The application notes to U.S.S.G. § 1B1.10 further direct district courts to take into consideration three categories of information in determining whether a sentencing reduction is warranted and the extent of any such reduction. U.S.S.G. § 1B1.10 cmt. n.1(B). First, the court **shall** consider the factors set forth in 18 U.S.C. § 3553(a). U.S.S.G. § 1B1.10 cmt. n.1(B)(i). Second, it **shall** consider 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, also known as the public safety consideration. U.S.S.G. § 1B1.10 cmt. n.1(B)(ii). Third, the court **may** consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment. U.S.S.G. § 1B1.10 cmt. n.1(B)(iii).

Finally, and importantly, the USSC has issued a special instruction as follows: "The court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court's order is February 1, 2024, or later." U.S.S.G. § 1B1.10(e)(2).

III. Standard Procedure

The District Court expects hundreds of *pro se* petitions to be filed by November 1, 2023 and thereafter. The procedure for handling any such petitions will be as follows:

A. *Pro se* petitions will be received by the Clerk of Court and will be filed in the same criminal case under a newly created category called "Motion re: Amendment 821." All pleadings related to the issue of a sentencing reduction (filed *pro se* or by retained, appointed, or *pro bono* counsel) should also be filed selecting the "Motion re: Amendment 821" category.⁴

B. The "Motion re: Amendment 821" category must already be linked to the designated parties at the USAO, USPO, and FPDO for purposes of electronic notification.

C. The Court hereby appoints the FPDO as default counsel to represent all defendants seeking a sentencing reduction under Amendment 821. This appointment is, of course, without prejudice to a defendant seeking to prosecute his reduction of sentence petition through retained, appointed, or *pro bono* counsel. All counsel, whether retained, appointed, or *pro bono*, shall abide by the guidelines, the terms, and the plan set forth in this directive.

⁴ No motion or pleading is to be filed under a restriction level unless absolutely necessary and only if the pleading contains sensitive information.

D. The Clerk of Court will automatically refer any *pro se* or original motion for sentence reduction ("Amendment 821 Motion") to a United States Magistrate Judge⁵ for initial screening. The initial screening entails a general determination as to eligibility. The Clerk of Court will provide the Magistrate Judge and the parties with access to pertinent documentation necessary to make the initial screening, such as but not limited to the plea agreement, plea supplement, and Presentence Investigation Report ("PSR"), and the Statement of Reasons.

E. The Magistrate Judge will issue his or her initial determination using the form that has been prepared and approved by the District Court. See Attachment 1. The Magistrate Judge shall identify the case number, the name of the defendant, defendant's number within the indictment, and the docket number of the Amendment 821 Motion. The form contains two possible recommendations: (1) that "the defendant is not eligible for a sentence reduction;" or (2) that the defendant "**may be** eligible for a sentence reduction." In addition to identifying a recommendation, if the Magistrate Judge determines the defendant is not eligible for a reduction, he or she should also select one or more of the applicable factors listing why the defendant ineligible for relief, as per statute or the

⁵ The District Court designates Magistrate Judge Bruce J. McGiverin to conduct this initial screening. In the absence or unavailability of Magistrate Judge McGiverin, the initial screening will be referred to Magistrate Judge Marcos E. López.

Sentencing Guidelines policy statement. The initial screening shall be completed within thirty days⁶ of the filing of the Amendment 821 Motion. The form shall be filed using the "Report and Recommendation re: Amendment 821" event and under the Magistrate Judge's electronic signature.

F. If the initial screening results in a determination that "the defendant is not eligible for a sentence reduction," the matter is formally submitted to the presiding District Judge. Defense counsel shall have fourteen days to object to the Magistrate Judge's initial assessment of ineligibility. After that fourteen (14) day period, and in the absence of an objection by defense counsel, the presiding District Judge may adopt the Report and Recommendation of the Magistrate Judge.

G. If the initial screening yields a determination that the defendant "**may be** eligible for a sentencing reduction," defense counsel and representatives from the USAO and USPO shall meet to discuss the case. This meeting must occur within fourteen (14) days of the issuance of the Magistrate Judge's Report and Recommendation. The USAO and defense counsel shall attempt to reach a stipulation for a reduction of sentence to be filed with the court. If a stipulation is not reached, the parties shall have fourteen (14) days thereafter to file simultaneous disagreement memoranda with

⁶ As with any other term or instruction contained in this directive, this term is not meant to confer any individual rights to a defendant or litigant.

the court. The disagreement memoranda of the parties shall not exceed five pages. Only in those cases where no stipulation is reached, the USPO must submit its position and assessment within the same fourteen-day period.

H. To comply with the above-outlined terms and time limits, representatives from the USAO, the FPDO, and the USPO shall meet at least every two weeks to discuss the cases that may be eligible for sentence reduction based on the initial screening. The FPDO will file any stipulations reached.

I. The court shall use Form AO 247 (Rev. 03/19), as approved by the U.S. Courts Administrative Office to rule upon any request for reduction of sentence. See Attachment 2. Judicial officers are reminded that the orders issued pursuant to this directive must have an effective date of February 1, 2024, or later. No defendant is eligible for release before that date.

IV. Effective Date

This Administrative Directive shall enter into effect immediately. While the court is not precluded from ruling on any petition for sentencing reduction and entering orders under 18 U.S.C. § 3582(c)(2), any order reducing a defendant's term of imprisonment must have an effective date of February 1, 2024, or later.

In San Juan, Puerto Rico, this 9th day of November 2023.

s/RAÚL M. ARIAS-MARXUACH
CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,

Plaintiff

v.

Criminal No. _____

_____,
Defendant

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
Re: Amendment 821

The below report and recommendation relates to an initial determination as to the defendant's eligibility for a sentencing reduction promulgated by the United States Sentencing Commission under Part A and Part B, Subpart 1 of Amendment 821 to Policy Statement § 1B1.10(d).

After careful review of the defendant's presentence report, charging document(s), plea agreement, plea supplement, judgment, and statement of reasons, I recommend that:

The defendant is not eligible for a sentence reduction based on the following factor(s):

A. The guidelines range that applied in the defendant's case was not determined by U.S.S.G. § 4A1.1(d) or defendant's status as a zero-point offender under Chapter 4, Part A.

B. The defendant does not meet all of conditions specified by § 4C1.1. Specifically, one or more of the following criteria applies:

1) the defendant has criminal history points from Chapter Four, Part A;

2) the defendant received an adjustment under U.S.S.G. § 3A1.4 (Terrorism);

3) the defendant used violence or credible threats of violence in connection with the offense;

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- 4) the offense resulted in death or serious bodily injury;
 - 5) the offense of conviction was a sex offense;
 - 6) the defendant personally caused substantial financial hardship;
 - 7) the defendant possessed, received, purchased, transported, transferred, sold, or otherwise disposed of a firearm or otherwise dangerous weapon (or induced another participant to do so) in connection with the offense;
 - 8) the offense of conviction was covered by U.S.S.G. § 2H1.1 (Offenses Involving Individual Rights); or
 - 9) the defendant received an adjustment under § 3A1.1 (Hate Crime Motivation or Vulnerable Victim) or § 3A1.5 (Serious Human Rights Offense).
- C. The application of Amendment 821 Part A and Part B, subpart 1 does not have the effect of lowering the defendant's applicable guideline range. See § 1B1.10(a)(2)(B).
- D. The defendant was originally sentenced to a term of imprisonment that is less than or equal to the minimum of the guideline range as amended by Amendment 821 Part A and Part B, subpart 1, and no exception for substantial assistance applies. See § 1B1.10(b)(2)(A).
- E. The defendant was sentenced to a statutorily mandated minimum imprisonment term. The defendant did not comply with the safety valve provisions and did not receive a reduction of his or her imprisonment term based on a departure for substantial assistance or a Rule 35 motion subsequent to the original sentence. See § 1B1.10(c).

Since a determination of ineligibility has been made, the matter is formally submitted to the presiding District Court Judge. Defense counsel, whether retained, appointed, or *pro bono*, has fourteen days to object to the initial assessment of ineligibility. After the fourteen day period, and in the absence of an objection

by defense counsel, the presiding District Court Judge may adopt the recommendation of the Magistrate Judge and may rule on the motion for reduction of sentence.

The defendant may be eligible for a sentence reduction and therefore the matter is referred to a United States District Judge.

The presiding judicial officer shall wait for the parties' stipulation of a sentence reduction within fourteen days. If no stipulation is reached within this period, the presiding judicial officer shall wait for the United States Probation Office, defense counsel, and the Government's memoranda, which shall be filed within another fourteen days.

Reasons:

IT IS SO RECOMMENDED.

In San Juan, Puerto Rico, this ____ of _____, 20__.

UNITED STATES MAGISTRATE JUDGE

**This page contains information that should not be filed in court unless under seal.
(Not for Public Disclosure)**

DEFENDANT: _____
CASE NUMBER: _____
DISTRICT: _____

I. COURT DETERMINATION OF GUIDELINE RANGE (Prior to Any Departures)

Previous Total Offense Level: _____ Amended Total Offense Level: _____
Criminal History Category: _____ Criminal History Category: _____
Previous Guideline Range: _____ to _____ months Amended Guideline Range: _____ to _____ months

II. SENTENCE RELATIVE TO THE AMENDED GUIDELINE RANGE

- The reduced sentence is within the amended guideline range.
- The previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a substantial assistance departure or Rule 35 reduction, and the reduced sentence is comparably less than the amended guideline range.
- The reduced sentence is above the amended guideline range.

III. FACTORS CONSIDERED UNDER USSG § 1B1.10 AND 18 U.S.C. § 3553(a) (See *Chavez-Meza v. United States*, 138 S.Ct. 1959 (2018))