



UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for the United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final action regarding retroactive application of Parts A and B, Subpart 1 of Amendment 821 (Amendment 8 of the amendments submitted to Congress on April 27, 2023), pertaining to criminal history.

SUMMARY: The Sentencing Commission hereby gives notice of an amendment to the policy statement and commentary in the *Guidelines Manual* that provides for a reduction in a defendant's term of imprisonment as a result of an amended guideline range. The amendment includes Parts A and B, Subpart 1 of Amendment 821 (Amendment 8 of the amendments submitted to Congress on April 27, 2023) in the policy statement as an amendment that may be available for retroactive application. The amendment also provides a special instruction requiring that any order granting sentence reductions based on Part A or Part B, Subpart 1 of Amendment 821 shall not take effect until February 1, 2024, or later.

DATES: The effective date of this amendment is November 1, 2023. However, as a result of the special instruction, any order reducing a defendant's term of imprisonment based on the retroactive application of Part A or Part B, Subpart 1 of Amendment 821 cannot take effect until February 1, 2024, or later.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not

later than the first day of May each year pursuant to 28 U.S.C. 994(p). Absent action of the Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

Section 3582(c)(2) of title 18, United States Code, 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 a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” Pursuant to 28 U.S.C. 994(u), “[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.” The Commission lists in §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2).

On April 27, 2023, the Commission submitted to the Congress amendments to the sentencing guidelines, policy statements, official commentary, and Statutory Index, which become effective on November 1, 2023, unless Congress acts to the contrary. *See* 88 FR 28254 (May 3, 2023). Parts A and B, Subpart 1 of Amendment 821 (Amendment 8 of the amendments submitted to Congress on April 27, 2023), pertaining to criminal history, have the effect of lowering guideline ranges for certain defendants. The Commission has now promulgated an amendment to include Parts A and B, Subpart 1 of Amendment 821 in the listing in §1B1.10(d) as an amendment that may be available for retroactive application. The amendment also provides a special instruction requiring that any order granting sentence reductions based on Part A or

Part B, Subpart 1 of Amendment 821 shall not take effect until February 1, 2024, or later, and includes commentary explaining and clarifying this special instruction.

The amendment to §1B1.10 set forth in this notice and the text of the amendments submitted to Congress on April 27, 2023 (published in 88 FR 28254 (May 3, 2023)) are also available on the Commission's website at www.ussc.gov.

Authority: 28 U.S.C. 994(a), (o), (u); USSC Rules of Practice and Procedure 2.2, 4.1, 4.1A.

Carlton W. Reeves,

Chair.

1. Amendment: Section 1B1.10 is amended—

in subsection (d) by striking “and 782 (subject to subsection (e)(1))” and inserting “782 (subject to subsection (e)(1)), and 821 (parts A and B, subpart 1 only and subject to subsection (e)(2))”;

and in subsection (e)—

in the heading, by striking “*Instruction*” and inserting “*Instructions*”;

and by adding at the end the following new paragraph (2):

“(2) 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.”.

The Commentary to §1B1.10 captioned “Application Notes” is amended—

by redesignating Notes 7 and 8 as Notes 8 and 9, respectively;

and by inserting after Note 6 the following new Note 7:

“7. *Application to Amendment 821 (Parts A and B, Subpart 1 Only).*—As specified in subsection (d), the parts of Amendment 821 that are covered by this policy statement are Parts A and B, Subpart 1 only, subject to the special instruction at subsection (e)(2). Part A amended §4A1.1 (Criminal History Category) to limit

the overall criminal history impact of “status points” (*i.e.*, the additional criminal history points given to defendants for the fact of having committed the instant offense while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status). Part B, Subpart 1 created a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders) to provide a decrease of two levels from the offense level determined under Chapters Two and Three for defendants who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors.

The special instruction at subsection (e)(2) delays the effective date of orders reducing a defendant’s term of imprisonment to a date no earlier than February 1, 2024. A reduction based on the retroactive application of Part A or Part B, Subpart 1 of Amendment 821 that does not comply with the requirement that the order take effect no earlier than February 1, 2024, is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2). Subsection (e)(2), however, does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before February 1, 2024, provided that any order reducing the defendant’s term of imprisonment has an effective date of February 1, 2024, or later.”.

Reason for Amendment: The Commission has determined that the targeted changes to the criminal history rules made in Parts A and B, Subpart 1 of Amendment 821 should be applied retroactively. Accordingly, this amendment expands the listing in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline

Range (Policy Statement)) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application.

Part A of Amendment 821 limits the overall criminal history impact of “status points” (*i.e.*, the additional criminal history points given to defendants for the fact of having committed the instant offense while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status) under §4A1.1 (Criminal History Category). Part B, Subpart 1 of Amendment 821 creates a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders) providing a decrease of two levels from the offense level determined under Chapters Two and Three for defendants who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors.

In making this determination, the Commission considered the following factors, among others: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively. *See* §1B1.10, comment. (backg’d.). Applying those standards to Amendment 821, the Commission determined that, among other factors:

- (1) The purpose of these targeted amendments is to balance the Commission’s mission of implementing data-driven sentencing policies with its duty to craft penalties that reflect the statutory purposes of sentencing and to reflect “advancement in knowledge of human behavior as it relates to the criminal justice process.” *See* 28 U.S.C. § 991(b). The Commission determined that the policy reasons underlying the prospective application of the amendment apply with equal force to individuals who are already sentenced.

In relation to Part A, the Commission determined that accounting for status on a more limited basis continues to serve the broader purposes of sentencing while also addressing other concerns raised regarding the impact of status points. The Commission also determined that the changes made by Part A reflect updated research suggesting that status points' ability to predict future recidivism—a core justification for their use—may be less than the original Commission may have expected.

In implementing Part B, Subpart 1, the Commission sought, in part, to fulfill one of its core congressional directives to ensure that “the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” *See* 28 U.S.C. § 994(j). The Commission further determined that the changes made by Part B, Subpart 1 reflect its statutory mission to provide for penalties that are “sufficient, but not greater than necessary” by recognizing that individuals with zero criminal history points have considerably lower recidivism rates than other sentenced individuals, as well as the fact that courts generally depart and vary more often in cases involving individuals with zero criminal history points as compared with other individuals.

- (2) The Commission determined that the changes in Parts A and B, Subpart 1 of Amendment 821 would meaningfully impact the sentence of many currently incarcerated individuals. The Commission estimates that 11,495 currently incarcerated individuals would have a lower guideline range as the result of

retroactive application of Part B, Subpart 1 of Amendment 821, with an average sentence reduction of 14 months (or 11.7%). The Commission further estimates that 7,272 currently incarcerated individuals would have a lower guideline range as the result of retroactive application of Part A of Amendment 821, with an average sentence reduction of 15 months (or 17.6%).

- (3) The Commission determined that applying Part A of Amendment 821 retroactively, requiring the recalculation of criminal history points and making the determination as to whether the individual would fall within a lower criminal history category, presents minimal difficulty. While recognizing that consideration of the exclusionary criteria in Part B, Subpart 1 of Amendment 821 could result in an increased administrative burden, the Commission concluded that any such burden is manageable.

The Commission concludes that consideration of these factors supports a policy determination that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. In making this determination, the Commission remains cognizant of the fact that public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. *See* §1B1.10, comment. (n.1(B)(ii)).

At the same time, the Commission also determined that the agencies of the federal criminal justice system responsible for reentry into society need time to prepare, and to

help the released individuals prepare, for that reentry. The Commission concluded that a three-month delay in the effective date of any orders granting sentence reductions under Amendment 821 is needed (1) to give courts adequate time to obtain and review the information necessary to make an individualized determination in each case of whether a sentence reduction is appropriate, (2) to ensure that, to the extent practicable, all individuals who are to be released have the opportunity to participate in reentry programs and transitional services, such as placement in halfway houses, while still in the custody of the Bureau of Prisons, which increases their likelihood of successful reentry to society and thereby promotes public safety, and (3) to permit those agencies that will be responsible for individuals after their release to prepare for the increased responsibility.

Therefore, the Commission added a Special Instruction at subsection (e) providing that a reduced term of imprisonment based on retroactive application of Amendment 821 shall not be ordered unless the effective date of the court's order is February 1, 2024, or later. An application note clarifies that this special instruction does not preclude the court from conducting sentence reduction proceedings before February 1, 2024, as long as any order reducing the term of imprisonment has an effective date of February 1, 2024, or later.