

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

In Re: Retroactive Application  
of Amendment 821.

STANDING ORDER No. BMM-27

Effective November 1, 2023, the United States Sentencing Commission has determined that the targeted changes to the criminal history rules made in Parts A and B, Subpart 1 of Amendment 821 to the United States Sentencing Guidelines should be applied retroactively. *See* U.S.S.G. Ret. App. A & B, Sub. 1 Amendment 821 “Reasons for Amendment” (Nov. 1, 2023), *available at* <https://www.ussc.gov/guidelines/amendments/retroactivity-amendment-effective-november-1-2023>. Consequently, defendants who received additional status points for committing the instant offense while under any criminal justice sentence, *see* §4A1.1, as well as certain “zero-point offenders” whose offense did not involve specified aggravating factors, may be entitled to a sentence reduction under 18 U.S.C. § 3582(c)(2).

The Commission’s purpose in enacting Amendment 821 is to balance its 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 have already been sentenced. In addition, while recognizing that applying Amendment 821 retroactively could result in an increased administrative burden, any such burden is manageable.

For many defendants, the reduction may result in earlier release from confinement. But some defendants who may be eligible for a reduced sentence may not be capable of filing *pro se* or may find the attempt to file difficult. These defendants may file their motions too late to benefit from Amendment 821’s retroactive application – or not at all. To the extent that eligible defendants are not heard because they are unable to obtain professional assistance in filing, the core purpose of Amendment 821 is frustrated by the defendant’s indigency. Conversely, defendants who are capable of filing *pro se* may not understand the requirements for eligibility and so may impede the Court’s efforts to address the motions of the large number of defendants who are eligible.

Consequently, the judges of the District of Montana find that the interests of fairness and judicial efficiency, as well as the purpose of the retroactive application of Amendment 821, will be materially advanced by the appointment of counsel to represent indigent defendants who are potentially eligible for a sentence reduction under the Amendment. 18 U.S.C. § 3006A(a)(1)(I), (a)(2).

Accordingly, IT IS HEREBY ORDERED as follows:

1. Any case in which a motion seeking retroactive application of Amendment 821 is filed that was previously assigned to United States District Judges Jack D. Shanstrom, Richard F. Cebull, Charles C. Lovell, or Sam E. Haddon, or assigned to a visiting judge, will be reassigned to United States District Judges Dana L. Christensen, Brian M. Morris, or Susan P. Watters.

2. As to all motions containing a claim for sentence reduction under 18 U.S.C. § 3582(c)(2) and Amendment 821, D. Mont. L.R. CR 47.2 is SUSPENDED.

3. Should any motion under 28 U.S.C. § 2255 also contain a request for sentence reduction under Amendment 821, the Rules Governing § 2255 proceedings apply, and this Order does not. Should any motion seeking compassionate release under 18 U.S.C. § 3582(C)(1)(A) also contain a request for sentence reduction under Amendment 821, Standing Order BMM-13 applies, and this Order does not.

4. Any deadline falling on November 24, 2023, is EXTENDED to the Monday following the deadline.

5. Provided the defendant was represented at sentencing by counsel appointed under the Criminal Justice Act, counsel will be appointed to represent each defendant identified by the Sentencing Commission as potentially eligible for

a sentence reduction under Amendment 821, *see* Attachment A, and each currently incarcerated defendant convicted in this court who files a *pro se* motion for sentence reduction under Amendment 821.

6. The attorney who represented a qualified defendant at the time of sentencing shall promptly determine whether any conflict arising after sentencing precludes representing the defendant with respect to a potential sentence reduction under 18 U.S.C. § 3582(c)(2) and Amendment 821. If a conflict exists, or if sentencing counsel is no longer available, counsel shall contact the Federal Defenders of Montana, who shall locate new, conflict-free counsel to represent the defendant.

7. When conflict-free counsel has been located, that person shall file a Notice of Appearance. Counsel's appointment under the Criminal Justice Act and under the terms of this Order will commence on that date. The scope of counsel's appointment under the terms of this Order is limited to a motion under 18 U.S.C. § 3582(c)(2). The case compensation maximum is \$2,700 at a rate of \$164.00 per hour. CJA Guidelines §§ 230.16(a), -23.20(i). The Clerk shall ensure the Judgment, the Statement of Reasons, the Presentence Report, any plea agreement, and any motion(s) under U.S.S.G. § 5K1.1 or Fed. R. Crim. P. 35(b), including any judgment(s), motion(s), letter(s), or informal objection(s) made under seal, are

filed in the electronic docket, and shall provide access to counsel for the United States and counsel for the Defendant.

8. Counsel shall review the file and contact the defendant regarding the defendant's eligibility for relief under Amendment 821 and counsel's availability to act for the defendant. If authorized by the defendant, counsel shall represent the defendant in any proceeding under Amendment 821.

9. The parties are not to rely upon Local Rule CR 49.3(a)(2)(E) to file motions or briefs under seal unless the document in question refers to assistance provided by the defendant.

10. If after consultation with counsel a defendant chooses to proceed *pro se*, counsel shall file a notice to that effect. Counsel's appointment shall terminate on filing of such notice. Otherwise, counsel's appointment shall continue through disposition of the motion and, if taken, any appeal.

11. The Federal Defenders of Montana are authorized to contact listed defendants who were not represented by appointed counsel at sentencing to advise them of the potential availability of counsel under the terms of this Order on a proper showing of indigency in a motion to the Court. Defendants who wish to have counsel appointed to represent them must complete a financial affidavit (Form CJA-23) and must request appointment of counsel.

12. To conserve the resources of the Probation Office, the Court will review each motion filed to determine whether the defendant is clearly ineligible for a sentence reduction. This review is intended only to screen out those defendants who are clearly ineligible for the reduction. Review will be completed within 21 days or less.

13. When review is completed, the Probation Office will be notified, and a “Remark” will be made in the docket. Proceedings on the motion will follow this schedule:

- a. Upon receipt of notice, the Probation Office will have 30 days to complete a draft addendum to the Presentence Report, including a new calculation of the guideline range and the information described in U.S.S.G. §1B1.10 Application Note 7.
- b. When it is completed, the draft addendum and Bureau of Prisons records will be shared with the parties, who will have seven days to attempt to resolve any objections.
- c. The final presentence report addendum will be completed within seven additional days.
- d. Within seven days of receipt of the final presentence report addendum, the parties shall file briefs stating their positions as to the defendant’s eligibility for the reduction; whether a reduction should be made; and, if so, the extent of the reduction.
- e. Unless the presiding judge sets a hearing, the matter will be decided on the briefs.

14. The presiding judge may rule on the motion at any time. The parties may at any time submit a joint stipulation that a sentence reduction is appropriate and that a reduction should be made to an agreed sentence.

15. The Clerk's Office and the Federal Defenders of Montana shall take all necessary measures to implement this Order.

16. This Order is effective upon filing and applies to pending motions under 18 U.S.C. § 3582(c)(2) and Amendment 821.

DATED this 31st day of October, 2023.

A handwritten signature in blue ink that reads "Brian Morris". The signature is written in a cursive style and is positioned above a horizontal line.

Brian Morris, Chief Judge  
United States District Court