

W.D.N.Y. Procedures for Retroactive Application of  
Parts A and B, Subpart 1 of Amendment 821  
(the Criminal History Amendments)

1. Identification of Eligible Cases - The United States Sentencing Commission (“Commission”) has provided a list of all eligible defendants who will be in prison as of February 1, 2024. The Commission has also provided a more inclusive list of all defendants sentenced in this District who did not receive any criminal history points or received status points who will be in prison as of February 1, 2024.
  
2. Motions - The Federal Public Defender may file a motion to reduce sentence under 18 U.S.C. § 3582(c)(2) for any defendant it deems eligible. The Federal Public Defender’s Office will be permitted to accept assignment of said individuals in the absence of the filing of a financial affidavit for the purposes of determining eligibility and filing of any motion for a reduction.
  
3. Scheduling Order – Upon the filing of any such motion pursuant to 18 U.S.C. § 3582(c)(2) by the Federal Public Defender’s Office, the Clerk’s Office will issue a Text Order signed by the presiding judge setting forth the following deadlines: (1) the United States Probation Office shall file on CM/ECF an Abbreviated Supplemental Presentence Report within 30 days of the Text Order, with access given to the Court, the United States Attorney’s Office, and the Federal Public Defender’s Office; (2) the United States Attorney’s Office shall file a response to the motion within 14 days of the filing of the Abbreviated Supplemental Presentence Report; and (3) in cases where the motion is opposed, the defendant may file a reply within 14 days of filing of any opposition papers. The form of

the Text Order is attached hereto as Exhibit A.

4. Abbreviated Supplemental Presentence Report – The Abbreviated Supplemental Presentence Report will include the following information: (1) the former guideline calculation and range; (2) the amended guideline calculation or criminal history category and range; (3) the amount of time already served; and (4) the defendant’s institutional adjustment and any public safety concerns.
5. Contested Motions – Once a contested motion is fully briefed, the motion will be taken under advisement. Oral argument is left to the discretion of the presiding judge.
6. Uncontested Motions - If the United States Attorney’s Office does *not* oppose the motion, it will file a submission so indicating and the motion may then be immediately taken under advisement.
7. Decision - Upon completion of briefing, the Court must determine whether and to what extent a defendant’s sentence should be reduced. In making this determination, § 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.

8. 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. The Probation Office will prepare the draft AO 247 and forward the same to the presiding judge. Once the AO 247 is filed, the Probation Office shall provide copies of it to the Bureau of Prisons and the U.S. Sentencing 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.
  
9. Identification of Pro se Motions to Reduce Sentence – It is expected that the District will receive requests for sentencing reductions from pro se defendants. These requests may take a variety of forms and may be sent to a variety of places. Some will be correctly labeled as motions to reduce sentence, while others may be labeled incorrectly or arrive as letters to the Clerk’s Office or to chambers asking for a sentence reduction or for general information.

Pro se correspondence 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 where it decides to represent the defendant, the Federal Public Defender's Office will file a Notice of Appearance and may file supplemental papers in support of the motion. 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 Probation Office and the United States Attorney's Office that it will not be representing the defendant. Probation will then send chambers a proposed order using form AO 247 setting forth the reasons for denial of the motion for the judge's consideration and signature. In other words, for pro se motions where the Federal Public Defender's Office elects not to represent the defendant, a response will not be required from the United States Attorney's Office nor will an Abbreviated Supplemental Presentence Report be prepared, unless otherwise ordered by the presiding judge.

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.

10. Counseled Motions (other than FPD's office). In the event that a motion is filed on behalf of a defendant by an attorney other than the Federal Public Defender's Office, the procedure outlined above for preparation of an Abbreviated Supplemental Presentence Report and response from the United States Attorney's Office, will generally be followed, in consultation with the presiding judge.
11. Notice of Electronic Filing & Access - 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, the Probation Office, 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. Designated individuals with both the United States Attorney's Office and the Federal Public Defender's Office shall be granted access to the plea agreement, judgment of conviction with statement of reasons, and any presentence investigation report filed on CM/ECF, consistent with the Order signed by the Chief Judge and attached hereto as Exhibit B.
12. VOSR Proceedings – For any defendant who is charged with a violation of supervised release, in preparing the sentencing statement the United States Probation Office shall reference the criminal history category in effect at the time of the initial sentence, but 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.

EXHIBIT A – STANDARD TEXT SCHEDULING ORDER

TEXT ORDER as to [name of the defendant]. The defendant has filed a Motion to Reduce Sentence under 18 U.S.C. § 3582(c)(2).

IT IS HEREBY ORDERED, that pursuant to the District Procedures for Retroactive Application of Parts A and B, Subpart 1 of Amendment 821 (the Criminal History Amendments), the United States Probation Office for the Western District of New York shall prepare an Abbreviated Supplemental Presentence Report to be filed within 30 days of the issuance of this Text Order, and it is further

ORDERED, that the United States Attorney's Office shall file a response to the defendant's motion within 14 days of the filing of the Abbreviated Supplemental Presentence Report, either in opposition to the motion or indicating that it does not oppose the motion, and it is further

ORDERED, that if the United States Attorney's Office files a submission in opposition to the defendant's motion, the Federal Public Defender's Office may file a reply within 14 days thereafter, and it is further

ORDERED, that oral argument will be scheduled by the Court, if necessary, by separate order; otherwise, the motion will be taken under advisement once fully briefed.

SO ORDERED.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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IN RE: 2023 Retroactive Sentencing  
Guidelines Amendments, Parts A and B,  
Subpart 1 of Amendment 821

**ORDER RELEASING  
COURT DOCUMENTS**

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**WHEREAS**, on August 24, 2023, the United States Sentencing Commission voted to make retroactive application of Guidelines Amendment 821, Part A and Part B, Subpart 1, relating to criminal history, effective February 1, 2024, and

**WHEREAS**, a number of defendants previously sentenced in the Western District of New York have been identified as potentially eligible for application of this retroactive legislation, and

**WHEREAS**, potentially eligible defendants are currently incarcerated with no significant source of income, and

**WHEREAS**, the Federal Defender's Office may represent these individuals, some of whom are not their former clients, and

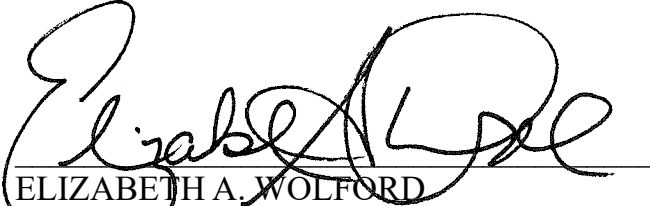
**WHEREAS**, in order to determine whether any particular defendant is actually eligible for relief the Federal Defender's Office and the United States Attorney's Office will need access to each individual's Presentence Investigation Report, Judgment of Conviction with Statement of Reasons, and Plea Agreement, it is therefore

**ORDERED**, that the United States District Court Clerk for the Western District of New York provide the Federal Defender's Office and the United States Attorney's Office

with access to the Presentence Investigation Report, Judgment of Conviction with Statement of Reasons, and Plea Agreement for any individual identified as potentially eligible for such reduction, and it is further

**ORDERED**, that the Federal Public Defender's Office be permitted to accept assignment of said individuals in the absence of the filing of a financial affidavit for the purposes of determining eligibility and filing of any motion for a reduction.

**SO ORDERED.**



ELIZABETH A. WOLFORD  
CHIEF JUDGE  
UNITED STATES DISTRICT COURT

Dated:           October 20, 2023  
                    Rochester, New York