UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

United States of America, Plaintiff, v. Felipe Solis-Sanchez, Defendant.	No. 2:12-cr-00079-KJM-AC ORDER

Defendant Felipe Solis-Sanchez moves the court to reduce his sentence to time served under 18 U.S.C. § 3582(c)(2) based on the retroactive application of the Sentencing Commission's Amendment 821 to the Sentencing Guidelines. The motion is **denied.**

I. BACKGROUND

Following an entry of a guilty plea to conspiracy to distribute and possess with intent to distribute controlled substances in violation of 21 U.S.C. §§ 846 and 841(a)(1), the then-presiding judge sentenced defendant to 192 months in prison followed by 60 months of supervised release. Mins. Sent'g, ECF No. 74; *see* Mins. Change of Plea, ECF No. 50; Indictment, ECF No. 7. The sentence was based in part on a 2-level increase in offense level under U.S.S.G. § 3B1.1(c) for defendant's aggravating role. *See* Presentence Investigation Report (PSR) ¶ 24, ECF No. 70; Tr. J. & Sent'g at 2:24–3:2, ECF No. 94 (adopting PSR). A year later, the court reduced defendant's sentence to 188 months in prison following a stipulated motion to reduce sentence.

Stip. Order at 3, ECF No. 98. The parties at that time agreed defendant was entitled to the benefit of the Sentencing Commission's Amendment 782, colloquially known as the "drugs minus two" amendment, which lowered the sentencing range applicable to defendant to 188 to 235 months by reducing his total offense level by two. *Id.* at 1–2; *see* Mot. at 2, 4, ECF No. 158; Opp'n at 5, ECF No. 161.

Defendant now argues he is entitled to an additional reduction of sentence based on Amendment 821 to the Sentencing Guidelines. Mot. The government opposes, Opp'n, and defendant has replied, Reply, ECF No. 162.

II. LEGAL STANDARD

In general, a "court may not modify a term of imprisonment once it has been imposed except" in limited circumstances. 18 U.S.C. § 3582(c). One exception is "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[.]" *Id.* § 3582(c)(2). In such cases, "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." *Id.* Thus, the court must engage in a two-step process to determine whether a final sentence should be modified. *See Dillon v. United States*, 560 U.S. 817, 826–27 (2010). First, the court determines whether the defendant is eligible for a sentence modification and the extent to which the reduction is authorized. *Id.* at 827. Second, the court must consider any applicable § 3553(a) sentencing factors and determine whether to exercise its discretion to reduce a sentence. *Id.*

III. ANALYSIS

The parties agree Amendment 821 applies retroactively. *See* Mot. at 3; Opp'n at 1; *see also United States v. Hoffman*, No. 08-00027, 2024 WL 870335, at *2 (D. Nev. Feb. 28, 2024) (Amendment 821 applies retroactively). Amendment 821 provides for a two-level reduction in the offense level of certain zero-point offenders, meaning defendants who received zero criminal history points. *See id.*; U.S.S.G. § 4C1.1. A defendant is entitled to a reduction under this provision if the defendant meets all criteria listed in that section, including "the defendant did not

receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848[.]" U.S.S.G. § 4C1.1(a)(10).

Defendant concedes he received an adjustment under § 3B1.1. Mot. at 5; *see also* PSR ¶ 24. Because he does not satisfy all the criteria listed in § 4C1.1, he is ineligible for a sentence reduction. *See, e.g.*, *United States v. Gonzalez-Cardenas*, No. 11-01926, 2024 WL 666343, at *2 (S.D. Cal. Feb. 16, 2024) (denying relief on similar grounds).

Defendant, however, argues he is eligible for a reduction in sentence despite having received an adjustment for an aggravating role because he was not engaged in a continuing criminal enterprise. Mot. at 5. Relying on a Ninth Circuit panel decision interpreting the safety-valve provision in 18 U.S.C. § 3553(f)(1), defendant argues he would be ineligible only if he both received an adjustment under § 3B1.1 and was engaged in a continuing criminal enterprise. *Id.* (citing *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021)).

Defendant's argument is not persuasive. As defendant concedes in his reply brief, *Lopez* has been abrogated by the Supreme Court in the recent decision in *Pulsifer v. United States*, 144 S. Ct. 718 (2024). *See* Reply at 1. Moreover, the court finds § 4C1.1 is unambiguous. A defendant is entitled to an adjustment under § 4C1.1 if "all" of the criteria in the section are met. U.S.S.G. § 4C1.1(a). Under the plain language of the guidelines, defendant must meet criterion number ten, which, as noted, provides "the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848[.]" *See id.* § 4C1.1(a)(10). Because defendant received an adjustment for his aggravating role under § 3B1.1, he does not satisfy this criterion even if he was not engaged in a continuing criminal enterprise. *See, e.g.*, *United States v. Arroyo-Mata*, No. 09-13, 2024 WL 1367796, at *2–4 & n.6 (N.D. Ga. Apr. 1, 2024) (collecting decisions from federal district courts around the country and providing textual analysis of section § 4C1.1(a)(1)). As defendant himself argues, "'and' means 'and'; it does not mean 'or.'" *See* Mot. at 5. Because the provision is unambiguous, the rule of lenity does not apply. *See United States v. D.M.*, 869 F.3d 1133, 1144 (9th Cir. 2017) (rule of lenity applies "where there is grievous ambiguity or uncertainty in the guidelines").

IV. CONCLUSION

Defendant is not eligible for a sentence modification under Amendment 821. Therefore, defendant's motion under 18 U.S.C. § 3582(c)(2) is **denied**.

This order resolves ECF No. 158.

IT IS SO ORDERED.

DATED: April 30, 2024.

CHIEF UNITED STATES DISTRICT JUDGE