

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

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

9 **II. LEGAL STANDARD**

10 In general, a “court may not modify a term of imprisonment once it has been imposed
11 except” in limited circumstances. 18 U.S.C. § 3582(c). One exception is “in the case of a
12 defendant who has been sentenced to a term of imprisonment based on a sentencing range that
13 has subsequently been lowered by the Sentencing Commission[.]” *Id.* § 3582(c)(2). In such
14 cases, “the court may reduce the term of imprisonment, after considering the factors set forth in
15 section 3553(a) to the extent that they are applicable, if such a reduction is consistent with
16 applicable policy statements issued by the Sentencing Commission.” *Id.* Thus, the court must
17 engage in a two-step process to determine whether a final sentence should be modified. *See*
18 *Dillon v. United States*, 560 U.S. 817, 826–27 (2010). First, the court determines whether the
19 defendant is eligible for a sentence modification and the extent to which the reduction is
20 authorized. *Id.* at 827. Second, the court must consider any applicable § 3553(a) sentencing
21 factors and determine whether to exercise its discretion to reduce a sentence. *Id.*

22 **III. ANALYSIS**

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

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

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

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

13 Defendant’s argument is not persuasive. As defendant concedes in his reply brief, *Lopez*
14 has been abrogated by the Supreme Court in the recent decision in *Pulsifer v. United States*,
15 144 S. Ct. 718 (2024). *See* Reply at 1. Moreover, the court finds § 4C1.1 is unambiguous. A
16 defendant is entitled to an adjustment under § 4C1.1 if “all” of the criteria in the section are met.
17 U.S.S.G. § 4C1.1(a). Under the plain language of the guidelines, defendant must meet criterion
18 number ten, which, as noted, provides “the defendant did not receive an adjustment under § 3B1.1
19 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in
20 21 U.S.C. 848[.]” *See id.* § 4C1.1(a)(10). Because defendant received an adjustment for his
21 aggravating role under § 3B1.1, he does not satisfy this criterion even if he was not engaged in a
22 continuing criminal enterprise. *See, e.g., United States v. Arroyo-Mata*, No. 09-13,
23 2024 WL 1367796, at *2–4 & n.6 (N.D. Ga. Apr. 1, 2024) (collecting decisions from federal
24 district courts around the country and providing textual analysis of section § 4C1.1(a)(1)). As
25 defendant himself argues, “‘and’ means ‘and’; it does not mean ‘or.’” *See* Mot. at 5. Because the
26 provision is unambiguous, the rule of lenity does not apply. *See United States v. D.M.*, 869 F.3d
27 1133, 1144 (9th Cir. 2017) (rule of lenity applies “where there is grievous ambiguity or
28 uncertainty in the guidelines”).

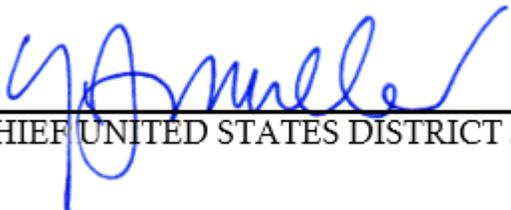
1 **IV. CONCLUSION**

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

4 This order resolves ECF No. 158.

5 IT IS SO ORDERED.

6 DATED: April 30, 2024.



CHIEF UNITED STATES DISTRICT JUDGE