

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

8 UNITED STATES OF AMERICA,	)	No. CR-F-94-5011 OWW
9 )	MEMORANDUM DECISION AND	
10 Plaintiff/ )	ORDER DENYING PETITIONER'S	
11 Respondent, )	MOTION FOR MODIFICATION OF	
12 )	SENTENCE PURSUANT TO 18	
13 )	U.S.C. § 3582(c) (2)	
14 vs. )		
15 )		
16 ROBERT GONZALES, )		
17 )		
18 Defendant/ )		
19 Petitioner. )		
20 )		
21 )		

On August 18, 2008, Petitioner Robert Gonzales filed a motion for modification of sentence pursuant to 18 U.S.C. § 3582(c) (2), (Doc. 614), based on retroactive application of Amendment 591 to the United States Sentencing Guidelines.

The United States has filed an opposition to Petitioner's motion and Petitioner has filed a reply. All briefing is now complete.

There is no dispute that Amendment 591 is retroactive and that Petitioner may seek a reduction of sentence pursuant to Section 3582(c) based on retroactive application of Amendment

1 591.<sup>1</sup>

2 Prior to Amendment 591, §1B1.1(a) of the Sentencing  
3 Guidelines provided:

4 (a) Determine the applicable offense  
5 guideline section from Chapter Two. See  
6 §1B1.2 (Applicable Guidelines). The  
Statutory Index (Appendix A) provides a  
listing to assist in this determination.

7 §1B1.2(a) provided:

8 Determine the offense guideline in Chapter  
9 Two (Offense Conduct) most applicable to the  
offense of conviction (*i.e.*, the offense  
conduct charged in the count of the  
indictment or information of which the  
defendant was convicted). *Provided*, however,  
11 in the case of a plea agreement (written or  
made orally on the record) containing a  
12 stipulation that specifically establishes a  
more serious offense than the offense of  
13 conviction, determine the offense guideline  
section in Chapter Two most applicable to the  
14 stipulated offense.

15  
16 <sup>1</sup>18 U.S.C. § 3582(c) (2) provides in pertinent part:

17 (c) Modification of an imposed term of  
imprisonment. - The court may not modify a  
18 term of imprisonment once it has been imposed  
except that -

19  
20 ...

21 (2) in the case of a defendant who has been  
sentenced to a term of imprisonment based on a  
22 sentencing range that has been subsequently  
lowered by the Sentencing Commission pursuant  
23 to 28 U.S.C. 994(o), upon motion of the  
defendant ..., the court may reduce the term  
of imprisonment, after considering the factors  
24 set forth in section 3553(a) to the extent  
that they are applicable, if such a reduction  
25 is consistent with applicable policy  
statements issued by the Sentencing  
26 Commission.

Effective November 1, 2000, pursuant to Amendment 591, these Sentencing Guidelines sections were amended:

Section 1B1.1 is amended by striking subsection (a) in its entirety and inserting:

'(a) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.'

Section 1B1.2(a) is amended by striking 'most' each place it appears; by striking 'Provided, however' and inserting 'However'; and by adding at the end the following:

'Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. See §2X5.1 (Other Offenses). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. See §1B1.9 (Class B or C Misdemeanors and Infractions).'

Amendment 591 sets forth the "Reason for Amendment:"

This amendment addresses a circuit conflict regarding whether the enhanced penalties in §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only in a case in which the defendant was convicted of an offense referenced to that guideline or, alternatively, in any case in which the defendant's relevant conduct included drug

1 sales in a protected location or involving a  
2 protected individual ....

3 In promulgating this amendment, the  
4 Commission also was aware of case law that  
5 raises a similar issue regarding selection of  
6 a Chapter Two (Offense Conduct) guideline,  
7 different from that referenced in the  
8 Statutory Index (Appendix A), based on  
9 factors other than the conduct charged in the  
10 offense of conviction ....

11 The amendment modifies §§1B1.1(a), 1B1.2(a),  
12 and the Statutory Index's introductory  
13 commentary to clarify the inter-relationship  
14 among these provisions. The clarification is  
15 intended to emphasize that the sentencing  
16 court must apply the offense guideline  
17 referenced in the Statutory Index for the  
18 statute of conviction unless the case falls  
19 within the limited 'stipulation' exception  
20 set forth in §1B1.2(a). Therefore, in order  
21 for the enhanced penalties in §2D1.2 to  
22 apply, the defendant must be convicted of an  
23 offense referenced to §2D1.2, rather than  
simply have engaged in conduct described by  
that guideline. Furthermore, the amendment  
deletes Application Note 3 of §1B1.2  
(Applicable Guidelines), which provided that  
in many instances it would be appropriate for  
the court to consider the actual conduct of  
the offender, even if such conduct did not  
constitute an element of the offense. This  
application note describes a consideration  
that is more appropriate when applying §1B1.3  
(Relevant Conduct), and its current placement  
in §1B1.2 apparently has caused confusion in  
applying that guideline's principles to  
determine the offense conduct guideline in  
Chapter Two most appropriate for the offense  
of conviction. In particular, the note has  
been used by some courts to permit a court to  
decline to use the offense guideline  
referenced in the Statutory Index in cases  
that were allegedly 'untypical' or 'outside  
the heartland.' ....

24 Petitioner argues that, pursuant to Amendment 591, the  
25 District Court was required to "utilize 2X1.1 before determining  
26

1 Petitioner's Chapter Two Offense Guideline range, as well as his  
2 substantive offense, which determines the base offense level."  
3 Petitioner contends that, "before the court can determine the  
4 Chapter Two offense guideline section applicable to the § 846  
5 Conspiracy, the court must first refer to §2X1.1 to determine the  
6 'Substantive' offense of conviction."

7 USSG §2X1.1 pertains to "Attempt, Solicitation, or  
8 Conspiracy (Not Covered by a Specific Offense Guideline)" and  
9 provides:

10 (a) Base Offense Level: The base offense  
11 level from the guideline for the substantive  
offense, plus any adjustment from such  
guideline for intended offense conduct that  
can be established with reasonable certainty.

13 Petitioner refers to Application Note 2 to §2X1.1:

14 'Substantive offense' as used in this  
15 guideline, means the offense that the  
defendant was convicted of soliciting,  
attempting, or conspiring to commit. Under §  
16 2X1.1(a), the base offense level will be the  
same as that for the substantive offense.  
17 But the only specific offense characteristics  
from the guideline for the substantive  
offense that apply are those that are  
determined to have been specifically intended  
19 or actually occurred. Speculative specific  
offense characteristics will not be applied.  
For example, if two defendants are arrested  
21 during the conspiratorial stage of planning  
an armed bank robbery, the offense level  
ordinarily would not include aggravating  
22 factors regarding possible injury to others,  
hostage taking, discharge of a weapon, or  
23 obtaining a large sum of money, because such  
factors would be speculative. The offense  
level would simply reflect the level  
applicable to robbery of a financial  
institution, with the enhancement for  
25 possession of a weapon. If it was  
26 established that the defendants actually

intended to physically restrain the teller, the specific offense characteristic for physical restraint would be added. In an attempted theft, the value of the items that the defendant attempted to steal would be considered.

Petitioner argues that the application of Amendment 591 to §1B1.2(a) means that the "most serious substantive crime that Petitioner conspired to commit and did commit, was a violation of §841(a)(1)" and that, therefore, Petitioner stands convicted of a non-punishable offense."

Petitioner's contentions are without legal merit. Petitioner's base offense level was determined under §2D1.1. Application Note 1 to §2X1.1 explains that certain attempts, conspiracies, and solicitations are covered by other offense guidelines and states that offense guidelines that expressly cover conspiracies include §2D1.1. Because Petitioner's offense was covered by a specific offense guideline, §2X1.1 does not apply and provides no basis for modification of Petitioner's sentence. See *United States v. Smith*, 2004 WL 259228 (6<sup>th</sup> Cir.), cert. denied, 541 U.S. 1082 (2004); *United States v. Augarten*, 2003 WL 23095537 (6<sup>th</sup> Cir. 2003), cert. denied, 541 U.S. 1004 (2004); *United States v. Shipp*, 2002 WL 1732603 (7<sup>th</sup> Cir. 2002).

Petitioner contends that the jury's verdict "was ambiguous as to which statutory penalty to apply to the §846 conspiracy conviction," that "an element of the crime of conspiracy under §846 is that the conspiracy must be to commit an offense under the Drug Abuse Prevention and Control subchapter" and that "[i]f

1 the jury finds no such object of the conspiracy, there is no  
2 crime", and that "the quantity of the controlled substance was  
3 neither found by a jury or proved beyond a reasonable doubt."  
4 Petitioner further argues that "under Amendment 591 the  
5 sentencing court cannot use factual findings to alter his Offense  
6 Guideline Section under 2D1.1, this finding must be based on  
7 Petitioner's (Offense of Conviction)." In his reply brief,  
8 Petitioner contends that, because the Indictment did not specify  
9 the amount of controlled substances, Petitioner's offense of  
10 conviction must be determined under 21 U.S.C. § 841(b)(1)(C),  
11 which will modify his Base Offense Level to 12, reducing his  
12 guideline sentencing range to 27 to 33 months incarceration.

13 None of these arguments pertain to Amendment 591. Although  
14 not specified by Petitioner, these arguments are based on  
15 *Apprendi v. New Jersey*. However, *Apprendi* does not affect  
16 guideline ranges and does not afford relief under Section 3582.  
17 See *United States v. Marshall*, 2002 WL 554448 (9<sup>th</sup> Cir.2002).

18 For the reasons stated, Petitioner's motion for modification  
19 of sentence pursuant to 18 U.S.C. § 3582(c)(2) is DENIED.

20 IT IS SO ORDERED.

21 Dated: December 22, 2008

/s/ Oliver W. Wanger  
22 UNITED STATES DISTRICT JUDGE

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