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

UNITED STATES OF AMERICA,)	No. CR-F-94-5011 OWW
)	
)	MEMORANDUM DECISION AND
)	ORDER DENYING PETITIONER'S
Plaintiff/)	MOTION FOR MODIFICATION OF
Respondent,)	SENTENCE PURSUANT TO 18
)	U.S.C. § 3582(c) (2)
vs.)	
)	
ROBERT GONZALES,)	
)	
)	
Defendant/)	
Petitioner.)	
)	
)	

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

1 591.¹

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

15
16 ¹18 U.S.C. § 3582(c)(2) provides in pertinent part:

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

20 ...

21 (2) in the case of a defendant who has been
22 sentenced to a term of imprisonment based on a
23 sentencing range that has been subsequently
24 lowered by the Sentencing Commission pursuant
25 to 28 U.S.C. 994(o), upon motion of the
26 defendant ..., 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.

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

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

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

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

15 'Refer to the Statutory Index
16 (Appendix A) to determine the
17 Chapter Two offense guideline,
18 referenced in the Statutory Index
19 for the offense of conviction. If
20 the offense involved a conspiracy,
21 attempt, or solicitation, refer to
22 §2X1.1 (Attempt, Solicitation, or
23 Conspiracy) as well as the
24 guideline referenced in the
25 Statutory Index for the substantive
26 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).'

27 Amendment 591 sets forth the "Reason for Amendment:"

28 This amendment addresses a circuit conflict
29 regarding whether the enhanced penalties in
30 §2D1.2 (Drug Offenses Occurring Near
31 Protected Locations or Involving Underage or
32 Pregnant Individuals) apply only in a case in
33 which the defendant was convicted of an
34 offense referenced to that guideline or,
35 alternatively, in any case in which the
36 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
24 simply have engaged in conduct described by
25 that guideline. Furthermore, the amendment
26 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.'

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

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
12 offense, plus any adjustment from such
13 guideline for intended offense conduct that
14 can be established with reasonable certainty.

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

16 'Substantive offense' as used in this
17 guideline, means the offense that the
18 defendant was convicted of soliciting,
19 attempting, or conspiring to commit. Under §
20 2X1.1(a), the base offense level will be the
21 same as that for the substantive offense.
22 But the only specific offense characteristics
23 from the guideline for the substantive
24 offense that apply are those that are
25 determined to have been specifically intended
26 or actually occurred. Speculative specific
offense characteristics will not be applied.
For example, if two defendants are arrested
during the conspiratorial stage of planning
an armed bank robbery, the offense level
ordinarily would not include aggravating
factors regarding possible injury to others,
hostage taking, discharge of a weapon, or
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
possession of a weapon. If it was
established that the defendants actually

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

7 Petitioner argues that the application of Amendment 591 to
8 §1B1.2(a) means that the "most serious substantive crime that
9 Petitioner conspired to commit and did commit, was a violation of
10 §841(a)(1)" and that, therefore, Petitioner stands convicted of a
11 non-punishable offense."

12 Petitioner's contentions are without legal merit.
13 Petitioner's base offense level was determined under §2D1.1.
14 Application Note 1 to §2X1.1 explains that certain attempts,
15 conspiracies, and solicitations are covered by other offense
16 guidelines and states that offense guidelines that expressly
17 cover conspiracies include §2D1.1. Because Petitioner's offense
18 was covered by a specific offense guideline, §2X1.1 does not
19 apply and provides no basis for modification of Petitioner's
20 sentence. See *United States v. Smith*, 2004 WL 259228 (6th Cir.),
21 *cert. denied*, 541 U.S. 1082 (2004); *United States v. Augarten*,
22 2003 WL 23095537 (6th Cir.2003), *cert. denied*, 541 U.S. 1004
23 (2004); *United States v. Shipp*, 2002 WL 1732603 (7th Cir.2002).

24 Petitioner contends that the jury's verdict "was ambiguous
25 as to which statutory penalty to apply to the §846 conspiracy
26 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 (9th 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
UNITED STATES DISTRICT JUDGE