

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NO. 07-2060

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UNITED STATES OF AMERICA

v.

VICTOR GONZALEZ, a/k/a Puerto Rican Vic,  
Appellant.

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On Appeal From the United States District Court  
For the District of New Jersey  
(D.C. Crim. No. 96-cr-00114)  
District Judge: Honorable Joseph A. Greenaway, Jr.

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Submitted on a Motion for Summary Affirmance  
Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6  
September 20, 2007

Before: RENDELL, SMITH AND JORDAN, CIRCUIT JUDGES

(Filed October 15, 2007)

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OPINION

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PER CURIAM

Appellant Victor Gonzalez, a federal prisoner, was convicted in 1996 of conspiracy to engage in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d), and engaging in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), among other convictions not relevant here. Predicate acts for the racketeering

counts included conspiracy to commit murder and murder contrary to N.J. Stat. Ann. §§ 2C:11-3, 2C:2-6, and 2C:5-2. Gonzalez was sentenced under the United States Sentencing Guidelines to three concurrent terms of life in prison. We affirmed the conviction and sentence on March 13, 1998 in United States v. Gonzalez, No. 97-5166.

On January 26, 2007, Gonzalez filed a motion for reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2), contending that his base offense level should have been 19 instead of 43. He based his argument on Amendment 591 to the Guidelines, which went into effect on November 1, 2000, contending that it prohibited the application of U.S.S.G. § 2A1.1, the first degree murder guideline, to him. In an order entered on March 28, 2007, the District Court denied the motion, concluding that Amendment 591 does not lower Gonzalez' sentencing range. Gonzalez appeals. After he filed his informal brief, the government moved to summarily affirm the order of the District Court. We have reviewed both Gonzalez' informal brief and his response in opposition to the government's motion in deciding this appeal.

We will summarily affirm under Third Circuit LAR 27.4 and I.O.P. 10.6, because it clearly appears that no substantial question is presented by this appeal. We have jurisdiction under 28 U.S.C. § 1291. Our review is plenary. United States v. Thompson, 70 F.3d 279, 280-81 (3d Cir. 1995). As explained by the District Court, section 3582(c)(2) permits modification of a sentence after it has been imposed if a defendant's term of imprisonment was based on a sentencing range that has subsequently been lowered by the Sentencing Commission. 18 U.S.C. § 3582(c)(2) (2007). A sentencing

guideline that has been amended after a defendant has been sentenced may be applied retroactively in a section 3582(c)(2) proceeding if it is given retroactive effect under § 1B1.10(c) of the Guidelines. Thompson, 70 F.3d at 281. Amendment 591 is given retroactive effect in § 1B1.10(c); thus, Gonzalez may seek relief under that amendment.<sup>1</sup>

A modification under section 3582(c)(2) is, however, unwarranted in Gonzalez' case. Amendment 591 changed §§ 1B1.1 and 1B1.2 of the guidelines, the Application Note to § 1B1.2, and the Introduction to the Statutory Index (Appendix A). United States v. Diaz, 245 F.3d 294, 301 (3d Cir. 2001). "The new Application Note unequivocally provides that the court is to use the guideline provided in the Statutory Index (Appendix A) for the offense of conviction," id. at 302 (internal quotation marks removed), rather than a guideline based on judicial findings of actual conduct that did not constitute an element of the offense.

The Statutory Index directs the sentencing court to § 2E1.1 on Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations for convictions under 18 U.S.C. §§ 1962(d) and 1962(c). The base offense level under § 2E1.1 is 19 or "the offense level applicable to the underlying racketeering activity," whichever is greater.

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<sup>1</sup> United States v. Diaz, 245 F.3d 294 (3d Cir. 2001), is not to the contrary. Diaz held that Amendment 591, which went into effect after the defendant was sentenced but prior to the conclusion of her direct appeal, could not be applied retroactively to justify affirming a sentence imposed by the district court because the effect would be to deprive the defendant of an opportunity for a lower sentence under our case law as it existed prior to its rejection by the Sentencing Commission. Id. at 304. Diaz is grounded on the need to avoid an *ex post facto* problem stemming from applying an amendment enacted after the defendant was sentenced to punish her more harshly.

U.S.S.G. § 2E1.1. Application Note 2 to § 2E1.1 provides that if the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used. Id., Application Note 2. The predicate acts of murder and conspiracy to commit murder violate New Jersey law. Specifically, a violation of N.J. Stat. Ann. § 2C:11-3a occurs when: (1) The actor purposely causes death or serious bodily injury resulting in death; or (2) The actor knowingly causes death or serious bodily injury resulting in death....” It is a crime in the first degree. N.J. Stat. Ann. § 2C:11-3b(1). The analogous federal statute is the murder statute, 18 U.S.C. § 1111. The sentencing guideline for first degree murder is U.S.S.G. § 2A1.1, which provides for a base offense level of 43. A base offense level of 43 carries a sentence of life in prison, the same sentence Gonzalez is serving.

In short, applying the guideline dictated by the statute of conviction and following the directions set forth in the guidelines, ineluctably leads to § 2A1.1 as the basis for determining the base offense level in Gonzalez’ case. “The plain wording of Amendment 591 applies *only* to the choice of the applicable offense guideline, not to the subsequent selection of the base offense level.” United States v. Rivera, 293 F.3d 584, 586 (2d Cir. 2002). Amendment 591 did not lower the sentencing range upon which Gonzalez’ term of imprisonment was based.

We will grant the government’s motion and summarily affirm the order of the District Court denying the motion to modify sentence.