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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p style="text-align: center;">v.</p> <p>SANCO GRANT III,</p> <p style="text-align: center;">Defendant - Appellee.</p>

No. 07-50086

D.C. No. CR-05-00813-JSL-2

MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Submitted February 6, 2009**
Pasadena, California

Before: HALL, SILVERMAN and CALLAHAN, Circuit Judges.

The United States appeals the district court’s imposition of a sentence below the mandatory minimum required by 21 U.S.C. § 841(b)(1) for Defendant Grant following his guilty plea to violating 21 U.S.C. §§ 846 and 841(a)(1),

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(b)(1)(A)(iii). We have jurisdiction pursuant to 18 U.S.C. § 3742(b)(1). We review de novo both the question of whether the district court possessed the authority to impose a sentence below the statutorily mandated minimum, *United States v. Vilchez*, 967 F.2d 1351, 1353 (9th Cir. 1992), and the constitutionality of the sentence, *United States v. Barajas-Avalos*, 377 F.3d 1040, 1060 (9th Cir. 2004), and we vacate and remand for re-sentencing.

We previously have held that, absent an applicable exception under 18 U.S.C. §§ 3553(e) or (f),¹ district courts lack the authority to refuse to impose the mandatory minimum sentence required by 21 U.S.C. § 841(b)(1). See *United States v. Haynes*, 216 F.3d 789, 799-800 (9th Cir. 2000). The Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), does not alter this conclusion. See *United States v. Hernandez-Castro*, 473 F.3d 1004, 1007 (9th Cir. 2007).

Likewise, we previously have held that the imposition of a mandatory minimum sentence does not violate a defendant's Fifth Amendment right to due process, even post-*Booker*. See *United States v. Hungerford*, 465 F.3d 1113, 1118 (9th Cir. 2006). This is true even if the district court considers the sentence to be unreasonable. See *United States v. Washington*, 462 F.3d 1124, 1140 (9th Cir. 2006) (“[J]udges still are required to impose higher mandatory minimum sentences

¹ Grant does not contend that any exception applies in his case.

. . . even if the mandatory minimum makes it impossible for the judge to impose a sentence that the court considers reasonable.”).

Finally, the imposition of a ten-year sentence under these circumstances would not violate Grant’s Eighth Amendment right to be free from cruel and unusual punishment. *See United States v. Labrada-Bustamante*, 428 F.3d 1252, 1265 (9th Cir. 2005) (upholding 20-year mandatory minimum sentence under 21 U.S.C. § 841 against Eighth Amendment challenge).

We conclude that the district court erred in sentencing Grant below the mandatory minimum, and we therefore vacate the sentence and remand for re-sentencing consistent with this memorandum disposition.

SENTENCE VACATED and REMANDED for re-sentencing.