

DEC 10 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOE HERNANDEZ, AKA Shakey Joe,

Defendant - Appellant.

No. 09-50084

D.C. No. 2:95-cr-00345-RSWL-20

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Submitted November 16, 2009**

Before: THOMPSON, TROTT and TALLMAN, Circuit Judges.

A defendant is not eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) when the application of that amendment does not result in a sentencing range “lowered by the Sentencing Commission.” United States v. Leniear, 574

* 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).

F.3d 668, 673 (9th Cir. 2009). Here, the district court appropriately found as a fact that the defendant was responsible for the distribution of more than 4.5 kilograms of crack cocaine. This finding of fact maintained the defendant's base offense level at 38, which did not lower his sentencing range. Moreover, the district court properly exercised its discretion in determining that in consideration of the serious nature of his convictions -- including multiple RICO racketeering acts of conspiracy to commit multiple murders -- and the factors in 18 U.S.C. § 3553(a), a reduction of his sentence was not appropriate.

AFFIRMED.