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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NOT FOR PUBLICATION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.

ANTHONY DANE ROBERTY,

Defendant-Appellant.

No. 15-30338

D.C. No.
2:15-cr-00016-DLC-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, Chief Judge, Presiding

Submitted April 4, 2017**
Seattle, Washington

Before: **KOZINSKI** and **W. FLETCHER**, Circuit Judges, and
TUNHEIM,*** Chief District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

*** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

The government conceded that Amendment 801 to U.S. Sentencing Guidelines § 2G2.2(b)(3)(F) was a retroactive, clarifying amendment. Thus, we treat the amendment as retroactively applying to Roberty. See United States v. Morgan, 376 F.3d 1002, 1010–11 (9th Cir. 2004).

The government also conceded that the district court erred in calculating Roberty’s guidelines range by applying the section and increasing his offense level by two. The error was not harmless. “A mistake in calculating the recommended Guidelines sentencing range is a significant procedural error that requires us to remand for resentencing.” United States v. Munoz-Camarena, 631 F.3d 1028, 1030 (9th Cir. 2011) (citations omitted). Under the amended guidelines section, Roberty does not qualify for the two-level increase in § 2G2.2(b)(3)(F). Roberty is also potentially eligible for an additional two-level decrease. See U.S.S.G. § 2G2.2(b)(1). These changes would give Roberty a different guidelines range that does not substantially overlap with the range the district court calculated. Therefore, we must vacate Roberty’s sentence and remand to the district court for resentencing.

VACATED AND REMANDED.