

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20054  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH ALVIN ANDERSON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. CR H 90-108 S

- - - - -  
(September 23, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Joseph Alvin Anderson argues that he was sentenced based on a quantity of drugs which included waste liquids containing traces of methamphetamine and that Amendment 484 to the guidelines requires sentencing courts to exclude waste liquids in the calculation of the guideline sentence. Amendment 484 changed an application note to U.S.S.G. § 2D1.1 by explaining that the term "mixture or substance" does not include materials that must be separated from the controlled substance before the controlled substance can be used. U.S.S.G., App. C, amend. 484 (Nov. 1993).

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

"An example of such a material that is excluded from determining the weight of the mixture or substance is `waste water from an illicit laboratory used to manufacture a controlled substance.'" United States v. Shaw, \_\_\_F.3d\_\_\_ (5th Cir. Aug. 10, 1994, No. 94-50186), 1994 WL 416465 at \*1 (quoting amend. 484). The Sentencing Commission gave the amendment retroactive effect. Id.; see also § 1B1.10(d) (Nov. 1993).

This Court has not yet addressed the meaning of the term "mixture or substance" in light of amendment 484. United States v. Towe, 26 F.3d 614, 617 (5th Cir. 1994). It is unnecessary to reach that inquiry in this case because Anderson's sentence was not based on an amount of "mixture or substance" which contained waste products or unusable chemicals. Pursuant to § 5G1.1(b), the maximum guideline sentence of 51 months\*\* was replaced with the statutorily required minimum sentence of ten years required under 21 U.S.C. § 841(b)(1)(A)(viii). See United States v. Schmeltzer, 960 F.2d 405, 408 (5th Cir.) ("statutorily mandated sentences are incorporated into the Sentencing Guidelines and prevail over the guidelines when in apparent conflict"), cert. denied, 113 S. Ct. 609 (1992).

Although Anderson asserts that the district court erred by not applying Amendment 484 retroactively, his argument amounts to

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\*\*Anderson's argument that the district court erroneously calculated the guideline sentence by including "waste products" in the quantity of drugs it assessed is unavailing; at sentencing, Anderson argued, and the district court agreed, that he should be sentenced using a base offense level of 20 and a criminal history category of III, which yielded a guideline imprisonment range of 41-51 months.

a challenge to the district court's application of § 5G1.1(b) rather than one concerning the retroactive application of changes in the guidelines. This issue is not cognizable under § 3582(c)(2), see United States v. Imitiaz, No. 93-3636, slip op. at 4-5 (5th Cir. May 20, 1994) (unpublished; copy attached), and, accordingly, the district court did not err by refusing to lower Anderson's sentence.

AFFIRMED.