

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	NO. 07-578-01
	:	
JOSEPH GONZALEZ	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
SUR SENTENCING ENHANCEMENT

AND NOW, this 16th day of September, 2009, after a hearing and consideration of all documents submitted by the parties, I find the following:

1. On September 19, 2007, the defendant was charged with conspiracy to distribute 500 grams or more of methamphetamine.
2. On January 2, 2008, the government filed a Notice of Information alleging a prior drug conviction as a predicate offense for enhancing the defendant's sentence, if convicted, from a mandatory minimum of 10 years to a mandatory minimum of 20 years.
3. On October 31, 2008, the defendant pleaded guilty to conspiracy to possess with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. §§846 and 841(a)(1) and (b)(1)(A).
4. The total offense level as calculated by the Probation Office and determined by the Court is 34.
5. The defendant's criminal history category as calculated by the Probation Office is V.
6. The defendant's prior criminal record reflects a series of minor offenses, generally traffic offenses.
7. Taking into consideration the nature and the circumstances of each offense

constituting the defendant's criminal history, the criminal history category is over-represented and over-stated.

8. Considering the nature and the circumstances of each of the offenses constituting the defendant's criminal history category, his criminal history category is III.

9. With a total offense level of 34 and a criminal history category of III, the defendant's custodial guideline range is 188 to 235 months.

10. To enhance the mandatory minimum sentence, the government relies upon a 2004 drug conviction in the State of California for possession of a controlled substance which was recovered from the defendant's person and the car he was operating at the time of the traffic stop.

11. In the 2004 California case, the defendant was charged in a three-count complaint charging him with a felony drug possession offense and two traffic offenses arising out of the traffic stop.

12. On November 8, 2004, the defendant was sentenced to ninety days in the county jail under the California statute providing that certain offenses, known as "wobbler offenses," are classified as misdemeanors where the punishment imposed is less than imprisonment in a state prison.

CONCLUSIONS OF LAW

1. The Controlled Substances Act mandates a minimum prison sentence of 10 years for the drug offense in question. 21 U.S.C. §801(b)(1)(A).

2. The mandatory minimum sentence is increased to 20 years where the defendant has previously been convicted of a "felony drug offense." *Id.*

3. Whether a prior offense is counted under the statute for purposes of

imposing a 20 year mandatory minimum sentence is not determined by its classification as a felony or a misdemeanor, but rather whether the potential punishment for that offense exceeds one year imprisonment.

4. A state drug offense punishable by more than one year, even though it is classified as a misdemeanor, qualifies as a prior felony drug offense under §841(b)(1)(A). *Burgess v. United States*, 128 S.Ct. 1572 (2008).

5. It does not matter that the defendant had been charged with a felony, but whether it was considered a felony or a misdemeanor at the time sentence was imposed.

6. Under California law, whether the crime is categorized as a felony or a misdemeanor is determined at sentencing and is dependent on the punishment imposed. *People v. Terry*, 54 Cal. Rptr. 2d 769 (App. 1 Dist. 1996).

7. When the California court sentenced the defendant to ninety days in county jail, it determined the crime to be a misdemeanor. *People v. Trausch*, 42 Cal. Rptr. 2d 836 (App. 2 Dist. 1995).

8. Under California law, the maximum sentence for a misdemeanor is six months in the county jail. Cal. Penal Code §19.

9. By operation of law, the defendant's 2004 California offense was a misdemeanor which carries a maximum prison sentence of six months.

10. Because the California conviction upon which the government relies was a misdemeanor punishable by a prison term of no more than six months, it does not qualify as a prior felony drug conviction for purposes of enhancing the defendant's sentence.

/Timothy J. Savage
TIMOTHY J. SAVAGE, J.

