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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NOT FOR PUBLICATION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>Plaintiff - Appellee,</p> <p>v.</p> <p>LAWRENCE EARL GAY, aka Jiggie,</p> <p>Defendant - Appellant.</p>

No. 08-50459

D.C. No. 3:01-cr-00790-J-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, Jr., District Judge, Presiding

Submitted March 18, 2009**

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Lawrence Earl Gay appeals from the 120-month sentence imposed following modification of his sentence pursuant to 18 U.S.C. § 3582(c)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

* 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).

The government contends that this appeal should be dismissed in light of the appeal waiver set forth in Gay's plea agreement. We decline to reach the issue of whether this appeal falls within the scope of the appeal waiver, and instead affirm on the merits. *See United States v. Jacobo Castillo*, 496 F.3d 947, 957 (9th Cir. 2007) (en banc) (enforceable appeal waiver does not deprive this Court of jurisdiction).

Gay contends that the ten-year statutory mandatory minimum sentence set forth by 21 U.S.C. § 841(b)(1)(A)(iii) for conspiracy to distribute 50 grams or more of cocaine base violates due process in light of the disparity regarding the amount of powder cocaine necessary to trigger the same ten-year mandatory minimum sentence. We conclude that Gay has failed to show "that there is not even a debatable basis" for the specific distinction drawn by Congress between crack and powder cocaine, and therefore we reject Gay's contention. *See United States v. Norwood*, 555 F.3d 1061, 1068 (9th Cir. 2009).

Gay also contends that 21 U.S.C. § 841(b)(1)(A)(iii) cannot withstand constitutional scrutiny because the mandatory minimum is not related to the sentencing goals set forth in 18 U.S.C. § 3553(a). Because Congress "had a rational basis for its choice of penalties," Gay's substantive due process challenge

fails. *See Chapman v. United States*, 500 U.S. 453, 465 (1991).

AFFIRMED.