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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NOT FOR PUBLICATION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>ALFONZO DARNELL TOLBERT,</p> <p>Defendant - Appellant.</p>

No. 08-50356

D.C. No. 2:03-cr-00223-RMT

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Submitted July 14, 2009**

Before: SCHROEDER, THOMAS, and WARDLAW, Circuit Judges.

Alfonzo Darnell Tolbert appeals from the district court’s denial of his motion for a sentence reduction pursuant to 18 U.S.C. §3582(c). We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court.

* 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).

Tolbert contends that the district court had authority to lower his sentence pursuant to 18 U.S.C. § 3582(c) because his sentence was “based on” a range that Amendment 706 to the United States Sentencing Guidelines has subsequently lowered. This contention is foreclosed because Tolbert received a mandatory-minimum sentence. *See United States v. Paulk*, 08-50229, 2009 WL 1788567, at *1 (9th Cir. June 24, 2009) (per curiam); *see also United States v. Leniear*, 568 F.3d 779, 783-84 (9th Cir. 2009).

_____ He further argues that the district court erred pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Hollis*, 490 F.3d 1149, 1156-57 (9th Cir. 2007), because the indictment did not allege that the drugs involved were crack cocaine. This court has rejected similar contentions as beyond the scope of a motion under 18 U.S.C. § 3582(c). *See Paulk*, 08-50229, 2009 WL 1788567, at *1. In any event, Tolbert conceded as part of the factual basis of his guilty plea that the drugs recovered were in rock cocaine form. *See Hollis*, 490 F.3d at 1157.

Tolbert’s motion to stay his appeal until the issuance of a decision in *Paulk* is denied as moot.

AFFIRMED.