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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TYLER JACOB CONKLIN, AKA Jack Auckland AKA Jake, AKA John Roberts, Defendant-Appellant.	No. 21-50150 D.C. Nos. 8:20-cr-00046-JVS-1 8:20-cr-00046-JVS MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Submitted November 17, 2022[**]
Pasadena, California

Before: WARDLAW and W. FLETCHER, Circuit Judges, and KENNELLY,[***]

District Judge.

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[*] 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 Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

Tyler Conklin appeals his sentence for possession of methamphetamine with intent to distribute. 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii). The district court applied the "career offender" enhancement, Sentencing Guidelines § 4B1.1, in determining Conklin's sentence. The court relied on *United States v. Rodriguez-Gamboa*, 927 F.3d 1148 (9th Cir. 2020), to conclude that Conklin had prior convictions that qualified as "controlled substance offenses" for the purposes of § 4B1.1. Conklin argues that the district court violated due process by applying the career offender enhancement because *Rodriguez-Gamboa* was published after Conklin committed the offense. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

Due process challenges to sentencing decisions based on allegations of unforeseeable judicial construction receive de novo review. *United States v. Staten*, 466 F.3d 708, 713 (9th Cir. 2006). When the district court errs in its calculation of the recommended Guidelines sentence, harmless error review applies. *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 (9th Cir. 2011).

Applying de novo review, we conclude that the district court did not err in applying the career offender enhancement. In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Supreme Court held that the Due Process Clause protects against "an unforeseeable judicial enlargement of a criminal statute, applied retroactively"

because such enlargement "operates precisely like an ex post facto law." 378 U.S. at 353. But this Court has repeatedly held that *Bouie* "applie[s] only to after-the-fact increases in the scope of criminal liability *and not to retroactive sentence enhancements*." *United States v. Dupas*, 419 F.3d 916, 920 (9th Cir. 2005) (quoting *Holgerson v. Knowles*, 309 F.3d 1200, 1202 (9th Cir. 2002)) (emphasis in original); *see also United States v. Newman*, 203 F.3d 700 (9th Cir. 2000); *United States v. Ruiz*, 935 F.2d 1033 (9th Cir. 1991).

The only effect of our decision in *Rodriguez-Gamboa* was an enhancement of Conklin's sentence. The scope of criminal liability was not affected. Therefore, the district court did not violate due process by relying on *Rodriguez-Gamboa* when calculating Conklin's sentence.

AFFIRMED.