

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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6
7 August Term, 2008

8
9 (Argued: Tuesday, July 7, 2009

Decided: July 21, 2009)

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11 Docket No. 08-1338-cr
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14
15 UNITED STATES OF AMERICA,

16
17 *Appellee,*

18
19 -v.-

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21 ROBERT J. AMICO,

22
23 *Defendant-Appellant.*
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26 Before: CALABRESI and HALL, *Circuit Judges*, and SESSIONS, *District Judge*.¹
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30 Appellant argues that the United States District Court for the Western District of New
31 York (Siragusa, *J.*) erred by not applying retroactively a 2001 amendment to the “gross receipts”
32 provision of the United States Sentencing Guidelines. The District Court’s judgment is
33 AFFIRMED.

¹ The Honorable William K. Sessions, III, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

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3 TERRANCE P. FLYNN, United States Attorney (MONICA J.
4 RICHARDS, Assistant United States Attorney, *of Counsel*),
5 Buffalo, N.Y., *for Appellee*.

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8 J. SCOTT PORTER, Seneca Falls, N.Y., *for Defendant-Appellant*.
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10 PER CURIAM:

11 Defendant-Appellant Robert J. Amico, pursuant to a plea agreement, pleaded guilty to
12 one count of participating in a continuing financial crimes enterprise, in violation of 18 U.S.C. §
13 225, and to one count of conspiracy to commit bank and mortgage fraud, in violation of 18
14 U.S.C. § 371. The parties agreed to apply the 1998 version of the United States Sentencing
15 Guidelines (Guidelines) to Amico’s sentencing. The parties disagreed, however, about whether a
16 2001 amendment to the Guidelines applies retroactively. We join the Seventh, Sixth, and Tenth
17 Circuits in finding that it does not.

18 Section 2F1.1(b)(7)(B) of the 1998 Guidelines states, in relevant part, that if the offense
19 “affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts
20 from the offense, increase by 4 levels.” U.S.S.G. § 2F1.1(b)(7)(B) (1998). In 2001, the
21 Sentencing Commission amended this provision to state, in relevant part, that if “the defendant
22 derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result
23 of the offense, increase by 2 levels.” U.S.S.G § 2B1.1(b)(12)(A). If the 2001 Amendment is a
24 clarification, rather than a substantive change, it applies retroactively. *See United States v.*
25 *Sabbeth*, 277 F.3d 94, 96 (2d Cir. 2002). But like the district court, we adopt the reasoning of the
26 Seventh Circuit in *United States v. Hartz*, 296 F.3d 595, 599 (7th Cir. 2002), which held that the

1 2001 amendment substantively changes an unambiguous provision and therefore does not apply
2 retroactively. *See also United States v. Swanson*, 360 F.3d 1155, 1167 (10th Cir. 2004)
3 (adopting *Hartz*'s reasoning); *United States v. Monus*, 356 F.3d 714, 718 (6th Cir. 2004) (same).

4 We have considered all of Amico's claims on appeal, and we find them to be without
5 merit. Accordingly, the District Court's sentence is AFFIRMED.