

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

FEB 20 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

JOSE ANTONIO TORRES-TONTLE,

Defendant - Appellant.

No. 05-50634

D.C. No. CR-04-01715-BTM

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Barry T. Moskowitz, District Judge, Presiding

Submitted February 20, 2009\*\*  
Pasadena, California

Before: D.W. NELSON, HAWKINS, and PAEZ, Circuit Judges.

Defendant-Appellant Jose Torres-Tontle appeals his conviction and sentence for attempting unlawful re-entry to the United States after removal in violation of 8 U.S.C. § 1326, and making a false claim to American citizenship in violation of

---

\* 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).

18 U.S.C. § 911. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the conviction, but vacate the sentence and remand for resentencing.

## **I. CONVICTION**

First, Torres-Tontle concedes that his claim as to the indictment was directly foreclosed by the Supreme Court in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007).

Second, Torres-Tontle contends that the district court erred when it failed to dismiss his indictment because of allegedly improper grand jury instructions. We reject this argument because this court has upheld the challenged instructions as constitutional. *See United States v. Cortez-Rivera*, 454 F.3d 1038, 1040-41 (9th Cir. 2006); *United States v. Navarro-Vargas*, 408 F.3d 1184, 1204 (9th Cir. 2005) (en banc). Accordingly, the district court did not err in denying the motion to dismiss the indictment.

Third, Torres-Tontle argues that his statements to Officer Hernandez in the secondary inspection area should have been excluded from evidence because he did not receive *Miranda* warnings. Torres-Tontle made two statements: (1) that he was not a United States citizen; and (2) that he had no papers allowing him to enter the United States. We decline to reach the merits of this claim because we find that any potential *Miranda* violation was harmless beyond a reasonable doubt. *United*

*States v. Khan*, 993 F.2d 1368, 1376 (9th Cir. 1993) (deciding that asserted *Miranda* violation was harmless without addressing the merits). Torres-Tontle’s statements did not contribute to the verdict because the record included ample independent evidence that 1) he was deported in 1997; 2) he admitted that he was not a United States citizen and was a citizen of Mexico in the 1997 hearing; 3) his immigration file and various databases contained no record of him becoming a naturalized citizen; 4) his fingerprints matched fingerprints on the various immigration documents introduced into evidence; and 5) officers issued a warrant of deportation in 2003. Thus, the un-Mirandized statements were “unimportant in relation to everything else the jury considered.” *Yates v. Evatt*, 500 U.S. 391, 403 (1991) (overruled in part on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 72-73 n.4 (1991)).

## **II. SENTENCE**

Torres-Tontle also claims that the district court erred in imposing the sixteen level enhancement, pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Torres-Tontle first complains that the district court erroneously relied on the prior conviction to enhance his sentence when it was not charged in the indictment or proven to a jury. In a prosecution under 8 U.S.C. § 1326, however, “a prior aggravated felony conviction does not have to be charged in an indictment, or

proven to a jury, before it can be used for sentence enhancement pursuant to § 1326(b)(2).” *United States v. Flores-Sanchez*, 477 F.3d 1089, 1093 (9th Cir. 2007) (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998)).

We have “consistently applied *Almendarez-Torres* to cases in which the defendant did not admit the prior convictions.” *Flores-Sanchez*, 477 F.3d at 1093.

Torres-Tontle, however, also argues that the district court erred because the conviction was not for a “crime of violence.” We agree. A conviction under California Penal Code Section 459 is not a “crime of violence” for purposes of U.S.S.G. § 2L1.2. *United States v. Aguila-Montes*, No. 05-50170, slip op. 749, 757–58 (9th Cir. Jan. 20, 2009). We therefore vacate the sentence imposed, and remand for resentencing.

**CONVICTION AFFIRMED; SENTENCE VACATED AND  
REMANDED.**