

MAR 06 2009

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERTO ZAMORA-ESPINOZA,

Defendant - Appellant.

No. 08-50250

D.C. No. 3:08-cv-00412-LAB

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Larry A. Burns, District Judge, Presiding

Submitted March 3, 2009\*\*  
Pasadena, California

Before: O'SCANNLAIN, RYMER, and WARDLAW, Circuit Judges.

Roberto Zamora-Espinoza appeals his 24-month sentence for attempting to smuggle aliens into the United States in violation of 8 U.S.C. § 1324(a)(2)(B)(iii).

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\* 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 facts need not be repeated here because they are already known by the parties.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Zamora-Espinoza claims that the district judge improperly departed from the Guidelines without providing reasonable notice. *See* Fed. R. Crim. P. 32(h). We conclude that the district court's above-Guidelines sentence of 24 months was the result of a variance, for which notice is not required. *See United States v. Irizarry*, 128 S. Ct. 2198 (2008). In any event, Zamora-Espinoza's attorney waived any Rule 32(h) claim by representing that the notice he received was reasonable.

Next, Zamora-Espinoza asserts that the district court impermissibly increased his sentence by considering the sentences given to others convicted of immigration offenses. He focuses on the trial court's mention of another defendant to be sentenced for the same offense later that morning. However, Zamora-Espinoza bears the burden of proving that any error (if error there were) was plain and affected his substantial rights; he has failed to do so.

Finally, Zamora-Espinoza's claim that his sentence is substantively unreasonable is without merit; the trial court adequately considered the 18 U.S.C. § 3553(a) factors.

**AFFIRMED.**