

APR 29 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NOT FOR PUBLICATION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.

ROLANDO HERNANDEZ-BARRIOS,

Defendant - Appellant.

No. 08-50106

D.C. No. 3:07-cr-02599-WQH-001

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted April 13, 2009**

Before: GRABER, GOULD, and BEA, Circuit Judges.

Rolando Hernandez-Barrios appeals from the 80-month sentence imposed following his guilty-plea conviction for being a deported alien found within the

* 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).

United States, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm, but remand to correct the judgment.

Hernandez-Barrios contends that the statutory maximum for his conviction is two years because the government did not allege in the indictment, and he did not admit, that he had been convicted of an aggravated felony prior to his deportation. This contention fails. *See United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1094 (9th Cir. 2007); *see also United States v. Salazar-Lopez*, 506 F.3d 748, 755 (9th Cir. 2007).

Hernandez-Barrios also contends that his sentence is unreasonable because the district court put too much weight on his criminal history as opposed to the positive aspects of his life. We conclude that the district court did not commit procedural error, and that the sentence is substantively reasonable. *See United States v. Stoterau*, 524 F.3d 988, 999-1002 (9th Cir. 2008).

Finally, in accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000), we remand the case to the district court with instructions that it delete from the judgment the incorrect reference to § 1326(b). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete the reference to § 1326(b)).

AFFIRMED; REMANDED to correct the judgment.