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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAFAEL VENEGAS-ZAMORA,

Defendant - Appellant.

No. 08-50240

D.C. No. 3:07-cr-01733-JAH-1

MEMORANDUM\*

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

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

Before: PREGERSON, GRABER, and WARDLAW, Circuit Judges.

Rafael Venegas-Zamora (“Venegas”) appeals the seventy-month sentence imposed after his guilty-plea conviction for illegal reentry following removal in

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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).

violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and we affirm but remand to correct the judgment.

1. The district court did not err by imposing a sixteen-level sentencing enhancement for Venegas’s prior conviction under California Penal Code section 288(a). *See* U.S.S.G. § 2L1.2(b)(1)(A)(ii) (2007). We previously have held that section 288(a) categorically constitutes a “crime of violence” under the approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See United States v. Medina-Maella*, 351 F.3d 944, 947 (9th Cir. 2003); *United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999). For the reasons explained in *United States v. Medina-Villa*, No. 07-50396, slip op. at 6339–48 (9th Cir. May 28, 2009), our recent decision in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc), does not change this conclusion.

2. We previously have rejected Venegas’s claim that the use of a prior conviction as a basis for both a sentencing enhancement and calculation of the defendant’s criminal history score constitutes impermissible double counting. *See United States v. Luna-Herrera*, 149 F.3d 1054, 1055–56 (9th Cir. 1998); *see also United States v. Blanco-Gallegos*, 188 F.3d 1072, 1076 (9th Cir. 1999). Moreover, we recently held that *United States v. Booker*, 543 U.S. 220 (2005), and its progeny “do not undermine or even affect the reasoning on which we relied in *Luna-*

*Herrera.*” *United States v. Garcia-Cardenas*, 555 F.3d 1049, 1050 (9th Cir. 2009) (per curiam). Accordingly, we reject Venegas’s challenge to § 2L1.2(b).

3. Venegas’s remaining arguments—that we should limit *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), to its facts under the doctrine of constitutional doubt; that *Almendarez-Torres* has been overruled; and that 8 U.S.C. § 1326(b) is unconstitutional—are squarely foreclosed by our precedent. *See United States v. Salazar-Lopez*, 506 F.3d 748, 751 n.3 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2523 (2008); *United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1096–97 (9th Cir. 2006).

4. Finally, although Venegas did not object to the inclusion of both § 1326(a) and § 1326(b) in his judgment, we remand to the district court in accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000), with instructions to enter a corrected judgment striking the 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 and REMANDED.**