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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p style="text-align: center;">v.</p> <p>SERGIO ESCOTO CORTEZ,</p> <p style="text-align: center;">Defendant - Appellee.</p>
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No. 07-50434

D.C. No. CR-07-00799-R-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Submitted June 16, 2009**

Before: PAEZ, and TALLMAN, and N.R. SMITH, Circuit Judges.

The United States appeals the sentence imposed following Sergio Escoto Cortez’s guilty plea to being an illegal alien found in the United States following deportation in violation of 8 U.S.C. § 1326. The district court imposed a

* 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).

suspended sentence and then placed the defendant on probation for five years with a condition that he spend twelve months in custody during the probationary period.

We reverse the district court and vacate the sentence for the reasons stated in *United States v. Murillo*, 548 F.3d 1256 (9th Cir. 2008) (explaining that district courts do not have the power to suspend the imposition of a sentence, nor can a district court impose a constant period of imprisonment as a condition of probation); *see also* United States Sentencing Guidelines Manual, Ch. 7, Part A, § 2(a) (2007). We remand with instructions that the district court impose an appropriate sentence in accordance with *Murillo*.

SENTENCE VACATED; REMANDED FOR RESENTENCING.