

JUL 21 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NOT FOR PUBLICATION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.

JOSE ANTONIO GARCIA-GRACIAN,

Defendant - Appellant.

No. 08-50458

D.C. No. 3:08-cr-01185-IEG

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, Chief District Judge, Presiding

Submitted July 14, 2009**

Before: SCHROEDER, THOMAS, and WARDLAW, Circuit Judges.

Jose Antonio Garcia-Gracian appeals from the 63-month sentence imposed following his guilty-plea conviction for illegal re-entry after deportation, in

* 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 we affirm but remand to correct the judgment.

Garcia-Gracian contends that the district court erred when it failed to grant him a downward departure, pursuant to U.S.S.G. § 5K2.0, based on pre-indictment delay. He also contends that his sentence is unreasonable. We review both contentions for reasonableness. *See United States v. Dallman*, 533 F.3d 755, 760-61 (9th Cir. 2008); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The district court did not procedurally err and the sentence is not substantively unreasonable. *See Carty*, 520 F.3d at 991-93.

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 8 U.S.C. § 1326(b).

AFFIRMED; REMANDED to correct the judgment.