

AUG 14 2009

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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NOT FOR PUBLICATION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>Plaintiff - Appellee,</p> <p>v.</p> <p>MARK A. ORANTEZ,</p> <p>Defendant - Appellant.</p>

No. 08-10439

D.C. No. 4:06-CR-00945-CKJ

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Submitted August 11, 2009**

Before: KLEINFELD, M. SMITH, and IKUTA, Circuit Judges.

Mark A. Orantez appeals from the 68-month sentence imposed upon
resentencing for his jury-conviction of conspiracy to possess with intent to

* 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).

distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(vii) and 846. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Orantez contends that the district court's imposition of a higher sentence upon resentencing must be considered "vindictive" and therefore violative of his due process rights. The record plainly reveals that on remand, the district court imposed a higher sentence because, among other things, Orantez was subject to a two-level sentencing enhancement for possession of a firearm under U.S.S.G. § 2D1.1(b)(1). Because the district court's reasons for imposing a higher sentence "affirmatively appear" in the record, Orantez failed to establish that the greater sentence was vindictive. *See Alabama v. Smith*, 490 U.S. 794, 798 (1989); *see also United States v. Garcia-Guizar*, 234 F.3d 483, 489-90 (9th Cir. 2000).

AFFIRMED.