

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 11 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE GUADALUPE VARGAS-
VICTORIA,

Defendant - Appellant.

No. 08-30358

D.C. No. 3:06-cr-00416-HA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Submitted September 3, 2009**
Seattle, Washington

Before: HAWKINS, McKEOWN and BYBEE, Circuit Judges.

Defendant Jose Guadalupe Vargas-Victoria (“Vargas”) appeals his conviction for illegal reentry in violation of 8 U.S.C. § 1326(a). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Even assuming admission of the certificate of non-existence of record, or CNR, violated the Confrontation Clause, the error was nonetheless harmless in this case because Special Agent Vela testified at trial that he had personally searched Vargas's A-File and the Central Index System but found no record that Vargas had sought consent to reapply for admission. *See United States v. Blanco-Gallegos*, 188 F.3d 1072, 1075 (9th Cir. 1999) (evidence A-File contained no record of alien's request for permission to reapply sufficient); *see also United States v. Earle*, 488 F.3d 537, 546 (1st Cir. 2007) (Confrontation Clause error harmless because CNR cumulative of agent's testimony, who had personally reviewed A-File).

Nor did the district court abuse its discretion by denying Vargas's motion for a new trial. Vargas argued that the prosecutor had confused the jury by blurring the distinction between consent to reapply for admission and actual permission to reenter the United States. The jury here was properly instructed on the elements of the offense, and even if the prosecutor did occasionally mention consent to reenter rather than consent to reapply, we have previously held a similar error in a jury instruction to be harmless. *Cervantes-Flores*, 421 F.3d at 834-35.

AFFIRMED.