

SEP 30 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NOT FOR PUBLICATION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 style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>APOLINAR GARCIA-MUNOZ,</p> <p style="text-align: center;">Defendant - Appellant.</p>

No. 08-50568

D.C. No. 3:07-CR-01176-JTM

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted September 14, 2009**

Before: SILVERMAN, RAWLINSON, and CLIFTON, Circuit Judges.

Apolinar Garcia-Munoz appeals from the 54-month sentence imposed following his jury-trial conviction for being a deported alien found in the United

* 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).

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

Garcia-Munoz contends that the district court erred at sentencing by failing to properly apply the parsimony principle embodied in 18 U.S.C. § 3553(a). The record reflects that district court did not procedurally err, and that Garcia-Munoz's sentence is not unreasonable. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc); *see also United States v. Nichols*, 464 F.3d 1117, 1124-26 (9th Cir. 2006).

As Garcia-Munoz concedes, his argument that *United States v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008), should be overruled may not be considered by a three judge panel. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

Next, as Garcia-Munoz concedes, his contention that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be overruled is foreclosed. *See United States v. Grisel*, 488 F.3d 844, 846-47 (9th Cir. 2007) (en banc).

Finally, we remand the case to the district court with instructions that it delete from the judgment the reference to 8 U.S.C. § 1326(b). *See United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000); *see also United States v.*

Herrera-Blanco, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete the reference to § 1326(b)(2)).

AFFIRMED; REMANDED to correct the judgment.