

OCT 07 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ARTURO MONTES-AVILES,

Defendant - Appellant.

No. 07-50420

D.C. No. CR-06-01367-BEN

MEMORANDUM\*

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

Submitted September 14, 2009\*\*

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

Arturo Montes-Aviles appeals the 63-month sentence imposed following his guilty-plea conviction for attempted illegal entry after deportation, in violation of

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\* 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).

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

Montes-Aviles contends that the district court violated his Sixth Amendment rights by enhancing his sentence sixteen levels based on facts neither admitted by Montes-Aviles nor alleged in the indictment. These contentions lack merit. *See United States v. Mendoza-Zaragoza*, 567 F.3d 431, 432 (9th Cir. 2009); *United States v. Grisel*, 488 F.3d 844, 847 (9th Cir. 2007) (en banc) (holding that date of prior conviction is part of “fact” of prior conviction for purposes of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

Nor did the district court commit Sixth Amendment error in calculating Montes-Aviles’s criminal history points. *See United States v. Hernandez-Castro*, 473 F.3d 1004, 1007 (9th Cir. 2007).

Montes-Aviles further contends that the district court procedurally erred by failing to consider the sentencing factors of 18 U.S.C. § 3553(a) and failing adequately to explain the sentence. The record reflects that the district court did not procedurally err. *See United States v. Carty*, 520 F.3d 984, 991-93 (9th Cir. 2008) (en banc).

Montes-Aviles also contends that his sentence is substantively unreasonable. The sentence is reasonable in light of the totality of the circumstances and the

sentencing factors of 18 U.S.C. § 3553(a). *See Gall v. United States*, 128 S. Ct 586, 597 (2007).

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 reference to 8 U.S.C. § 1326(b). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete reference to § 1326(b)).

**AFFIRMED; REMANDED** with instruction to correct the judgment.