

DEC 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NOT FOR PUBLICATION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 style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>FRANCISCO FLORES-BABICHI,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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Nos. 08-10508 & 08-10510

D.C. Nos. 4:08-cr-00274-DCB  
4:98-cr-00808-DCB

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
David C. Bury, District Judge, Presiding

Submitted November 17, 2009\*\*

Before: ALARCÓN, TROTT, and TASHIMA, Circuit Judges.

In these consolidated appeals, Francisco Flores-Babichi appeals from the 77-month sentence imposed following his guilty-plea conviction for illegal reentry

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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).

after deportation, in violation of 8 U.S.C. § 1326, and the 18-month consecutive sentence imposed following the revocation of the supervised release term he was serving for a prior guilty-plea conviction. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we vacate the sentence and remand for resentencing.

Flores-Babichi contends that the district court procedurally erred by failing to calculate the Guidelines range, by treating the Guidelines as mandatory and/or assigning them too much weight, and by focusing on only one of the 18 U.S.C. § 3553(a) sentencing factors, to the exclusion of the remaining factors. The record reflects that the district court did not procedurally err. *See Gall v. United States*, 128 S. Ct. 586, 596-97 (2007); *see also United States v. Simtob*, 485 F.3d 1058, 1062-63 (9th Cir. 2007).

Flores-Babichi also contends that the sentence imposed was substantively unreasonable because it was greater than necessary to accomplish the purposes of sentencing, and because the district court used a stale conviction to enhance his sentence. We remand to the district court for reconsideration of the sentence in light of *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1057-58 (9th Cir. 2009) (holding that it may be an abuse of discretion to impose a sentence that is largely predetermined by a 16-level enhancement without accounting for the staleness of

the prior conviction and the defendant's lack of other convictions for violent crimes).

**SENTENCE VACATED; REMANDED FOR RESENTENCING.**