

APR 21 2010

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SERGE L. MEZHERITSKY,

Defendant - Appellant.

No. 09-50237

D.C. No. 2:01-cr-00434-RMT

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Submitted April 5, 2010**

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

Serge L. Mezheritsky appeals pro se from the district court's denial of his motion to reduce his sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

Mezheritsky contends that re-sentencing is required pursuant to Fed. R. Crim. P. 35 or 18 U.S.C. § 3582(c)(2) because the district court erred by assigning him criminal history points from a sentence that was related to the instant conviction. This contention fails because the district court lacked authority to reconsider his sentence. *See United States v. Marler*, 527 F.3d 874, 878 n.1 (9th Cir. 2008) (noting that Amendment 709 concerning criminal history calculations does not apply retroactively); *see also United States v. Hetrick*, 644 F.2d 752, 756 (9th Cir. 1980) (stating that the timely filing of Rule 35 motion is jurisdictional).

Mezheritsky also contends for the first time in his reply brief that he is entitled to relief pursuant to Fed. R. Crim. P. 36. Even if it is preserved, this contention lacks merit. *See United States v. Kaye*, 739 F.2d 488, 491 (9th Cir. 1984) (“Rule 36 applies to clerical errors only.”).

AFFIRMED.