

MAY 27 2010

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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NOT FOR PUBLICATION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.

RICARDO RIOS-PEREZ,

Defendant - Appellant.

No. 08-50496

D.C. No. 3:08-cr-01452-WQH-1

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
William Q. Hayes, District Judge, Presiding

Argued and Submitted October 8, 2009  
Pasadena, California

Before: W. FLETCHER and CLIFTON, Circuit Judges, and SINGLETON, Senior  
District Judge.\*\*

Ricardo Rios-Perez appeals the 57-month sentence he received for attempted  
reentry after deportation in violation of 8 U.S.C. § 1326, challenging both the

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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 Honorable James K. Singleton, United States District Judge for  
the District of Alaska, sitting by designation.

categorization of his California attempted murder conviction as one for a crime of violence and the constitutionality of his sentence. We affirm.

We have rejected each of Rios-Perez's arguments that the offense of attempted murder under California law is not a crime of violence under the categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990). First, the "slight act" that California requires is equivalent to the "substantial step" in the generic version of attempt. See *United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1110 (9th Cir. 2009). Second, whether there are affirmative defenses is irrelevant to our analysis under the categorical approach. See *United States v. Velasquez-Bosque*, 601 F.3d 955, 963 (9th Cir. 2010) ("The availability of an affirmative defense is not relevant to the categorical analysis.").

We have also rejected Rios-Perez's remaining arguments: that *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998), has been overruled or abrogated; and that 8 U.S.C. § 1326(b) is unconstitutional. See, e.g., *United States v. Gomez-Mendez*, 486 F.3d 599, 606 (9th Cir. 2007).

**AFFIRMED.**