

JUL 21 2010

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff - Appellee,</p> <p>v.</p> <p>GERARDO AVINA-MARTINEZ,</p> <p>Defendant - Appellant.</p>
--

No. 09-10349

D.C. No. 4:09-cr-00250-CW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted June 29, 2010**

Before: ALARCÓN, LEAVY, and GRABER, Circuit Judges.

Gerardo Avina-Martinez appeals from the 37-month sentence imposed following his guilty-plea conviction for being a deported alien found in United States, in violation of 8 U.S.C. § 1326(a). We have jurisdiction under 28 U.S.C. § 1291. We affirm, but remand to correct the judgment.

* 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).

Avina-Martinez contends the district court procedurally erred by failing to discuss and apply the 18 U.S.C. § 3553(a) sentencing factors and by treating the advisory Guidelines as the presumptive sentencing range. The record indicates that the district court considered Avina-Martinez's arguments, properly applied the sentencing factors, and did not give undue weight to the advisory Guidelines sentencing range. *See Rita v. United States*, 551 U.S. 338, 356-59 (2007); *United States v. Carty*, 520 F.3d 984, 991-92, 995 (9th Cir. 2008) (en banc).

Avina-Martinez further argues that his sentence is substantively unreasonable because it fails to reflect that he reentered and stayed due to a family tragedy that left him with diminished capacity; his criminal history is overstated; and the 12-level sentencing enhancement was triggered by an anomalous and old narcotics conviction. The record reflects that under the totality of the circumstances, including the section 3553(a) factors, Avina-Martinez's bottom-of-the Guidelines sentence is reasonable. *See Carty*, 520 F.3d at 993; *cf. United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055-56 (9th Cir. 2009).

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 incorrect reference to section 1326(b). *See United*

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

AFFIRMED; REMANDED to correct judgment.