

AUG 02 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NOT FOR PUBLICATION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.

JOSEPH MORRIS PENA,

Defendant - Appellant.

No. 09-50398

D.C. No. 2:08-cr-01257-PSG

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Submitted July 19, 2010**

Before: B. FLETCHER, REINHARDT, and WARDLAW, Circuit Judges.

Joseph Morris Pena appeals from the 70-month sentence imposed following his guilty-plea conviction for being an illegal alien found in the United States following deportation, in violation of 8 U.S.C. § 1326(a). We have jurisdiction under 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).

Pena contends that the district court erred under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by increasing his sentence on the basis of a prior conviction that was neither proven to a jury beyond a reasonable doubt nor admitted. This argument, however, is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and this court's subsequent cases holding that *Almendarez-Torres* has not been overruled by subsequent Supreme Court decisions. *See, e.g., United States v. Almazan-Becerra*, 482 F.3d 1085, 1091 (9th Cir. 2007).

Pena further contends that his sentence was unreasonable. Our review of the record indicates that the district court did not procedurally err and that, under the totality of the circumstances, the 70-month sentence at the low end of the Guidelines was not substantively unreasonable. *See United States v. Carty*, 520 F.3d 984, 991-93 (9th Cir. 2008) (en banc); *see also United States v. Menyweather*, 447 F.3d 625, 632-33 (9th Cir. 2006) (downward departure under U.S.S.G. § 5H1.6 based on family circumstances “generally involve[s] situations where the defendant is an *irreplaceable* caretaker of children, elderly, and/or seriously ill family members”) (quoting *United States v. Leon*, 341 F.3d 928, 931 (9th Cir. 2003)). The district court was not bound by the parties' recommendations to impose a below-Guidelines sentence. *See, e.g., United States v. Hurt*, 345 F.3d 1033, 1036 (9th Cir. 2003). Nor does the fact that Pena was offered and rejected a

fast-track plea agreement that would have resulted in a lower Guidelines range render his sentence unreasonable. *See United States v. Vasquez-Landaver*, 527 F.3d 798, 805 (9th Cir. 2008).

AFFIRMED.