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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NOT FOR PUBLICATION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>Plaintiff - Appellee,</p> <p>v.</p> <p>ELVIS AYON-PLACENCIA,</p> <p>Defendant - Appellant.</p>
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No. 09-50437

D.C. No. 5:09-cr-00069-VAP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Submitted Februry 15, 2011**

Before: CANBY, FERNANDEZ, and M. SMITH, Circuit Judges.

Elvis Ayon-Placencia appeals from his guilty-plea conviction and 51-month sentence for illegal reentry by an alien following deportation, in violation of 8 U.S.C. § 1326(a). Pursuant to *Anders v. California*, 386 U.S. 738 (1967), Ayon-Placencia’s counsel has filed a brief stating there are no grounds for relief, along

* 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).

with a motion to withdraw as counsel of record. We have provided the appellant with the opportunity to file a pro se supplemental brief. No pro se supplemental brief or answering brief has been filed.

Ayon-Placencia waived his right to appeal his conviction and sentence with the exception of the court's calculation of his criminal history category. Our independent review of the record pursuant to *Penson v. Ohio*, 488 U.S. 75, 80-81 (1988), indicates that the appeal waiver is operative. Accordingly, we dismiss the appeal in part. See *United States v. Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000).

With regard to the court's calculation of the criminal history category, our independent review of the record discloses no arguable grounds for relief on direct appeal, and we affirm.

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 § 1326(b)(2). See *United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete the reference to § 1326(b)).

Counsel's motion to withdraw is **GRANTED**.

AFFIRMED in part; **DISMISSED** in part; **REMANDED** with instructions to correct the judgment.