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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NOT FOR PUBLICATION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.

JOSE E. CERVANTES-GUERRA,

Defendant - Appellant.

No. 09-50578

D.C. No. 3:09-cr-01388-BEN

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted February 15, 2011**

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

Jose E. Cervantes-Guerra appeals from the 57-month sentence imposed following his conviction for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. 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).

Cervantes-Guerra contends that the district court's failure to depart or vary from the Guidelines to reflect his level of culpability in his prior conviction created an unwarranted sentencing disparity and resulted in a substantively unreasonable sentence. The record reflects that the district court considered Cervantes-Guerra's individual circumstances with respect to his prior conviction and imposed a sentence that was substantively reasonable in light of the totality of the circumstances and the 18 U.S.C. § 3553(a) factors. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

Cervantes-Guerra also contends that he was denied the right of allocution. *See Fed. R. Crim. P. 32(i)(4)(A)(ii)*. This argument lacks merit because the sentencing court properly provided Cervantes-Guerra the opportunity to speak earlier in the hearing. *See United States v. Leasure*, 122 F.3d 837, 840-41 (9th Cir. 1997) (per curiam) (no denial of right of allocution where defendant had "clear and unrestricted opportunity" to speak during the sentencing hearing but the court refused to provide additional opportunity after beginning to pronounce defendant's sentence).

AFFIRMED.