

OCT 05 2011

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NOT FOR PUBLICATION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.

GASTON ORTIZ-ORTIZ,

Defendant - Appellant.

No. 10-50547

D.C. No. 3:08-cr-03263-L

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Submitted September 27, 2011**

Before: SILVERMAN, W. FLETCHER, and MURGUIA, Circuit Judges.

Gaston Ortiz-Ortiz appeals from the 77-month sentence imposed upon remand following his guilty-plea 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).

Ortiz-Ortiz contends that the district court erred by imposing a 16-level enhancement, pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii), because none of his prior convictions constitutes a crime of violence.

Prior to committing the instant offense, Ortiz-Ortiz suffered a conviction under California Penal Code § 422, for making criminal threats. This conviction is categorically a conviction for a crime of violence under U.S.S.G. § 2L1.2. *See United States v. Villavicencio-Burrueal*, 608 F.3d 556, 563 (9th Cir. 2010). Ortiz-Ortiz's collateral challenges to his section 422 conviction are unavailing because he was represented by counsel in that proceeding. *See Custis v. United States*, 511 U.S. 485, 496-97 (1994) (defendant in federal sentencing proceeding cannot collaterally attack validity of prior state conviction used to enhance sentence except where there was a "failure to appoint counsel at all").

AFFIRMED.