

DEC 30 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NOT FOR PUBLICATION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.

SALVADOR GARCIA-REAL, a.k.a.
Antonio Garcia, a.k.a. Salvador Real-
Garcia,

Defendant - Appellant.

No. 10-10575

D.C. No. 2:04-cr-00470-FCD

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, Jr., District Judge, Presiding

Submitted December 19, 2011**

Before: GOODWIN, WALLACE, and McKEOWN, Circuit Judges.

Salvador Garcia-Real appeals from the 24-month sentence imposed following revocation of supervised release. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

Garcia-Real contends that the court failed to explain sufficiently why it elected to impose a sentence of imprisonment in his supervised release case. This

* 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).

argument is meritless. The record makes clear that the court explained its decision, which was consistent with U.S.S.G. § 7B1.3(a)(1) and (f).

Garcia-Real also contends that the court failed to address his arguments regarding breach of trust and cultural assimilation. The court entertained and responded adequately to his arguments. *See United States v. Perez-Perez*, 512 F.3d 514, 516 (9th Cir. 2008).

Garcia-Real also argues that the district court relied on an inaccurate characterization of his criminal history in selecting a sentence. This contention has merit. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (selection of sentence based on clearly erroneous facts constitutes procedural error). The record reflects that the district court selected the sentence based in part on its understanding that Garcia-Real repeatedly engages in dangerous criminal conduct following his illegal reentries, an understanding that is refuted by the record. (*See* PSR ¶¶ 20-34, 43, 65.) Because Garcia-Real's substantial rights were affected by the error and because the error seriously affects the fairness of the proceedings, we exercise our discretion to remand. *See United States v. Olano*, 507 U.S. 725, 734-36 (1993). Our resolution of this issue renders it unnecessary to reach Garcia-Real's arguments regarding staleness and due process.

VACATED and REMANDED.