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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NOT FOR PUBLICATION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.

HERIBERTO SUAREZ-AGUILAR,

Defendant - Appellant.

No. 11-10213

D.C. No. 2:10-cr-00184-EJG

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Edward J. Garcia, District Judge, Presiding

Submitted February 21, 2012\*\*

Before: FERNANDEZ, McKEOWN, and BYBEE, Circuit Judges.

Heriberto Suarez-Aguilar appeals from the 57-month sentence imposed 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.

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\* 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).

§ 1291, and we affirm.

Suarez-Aguilar contends that his sentence is substantively unreasonable because the district court did not vary downward from the Guidelines range based on the “staleness” of his prior conviction, which served as the predicate for a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A). He also contends that the district court erred by failing to vary downward based on a proposed amendment to U.S.S.G. § 2L1.2(b) that was pending at the time he was sentenced.

In light of the totality of the circumstances, including the seriousness of Suarez-Aguilar’s prior conviction and his multiple prior deportations, the within-Guidelines sentence is not substantively unreasonable. *See* 18 U.S.C. § 3553(a); *Gall v. United States*, 552 U.S. 38, 51 (2007). Furthermore, the district court’s failure to grant the requested variance to reflect the proposed amendment to the Guidelines did not result in a substantively unreasonable sentence. *See United States v. Ruiz-Apolonio*, 657 F.3d 907, 918 (9th Cir. 2011) (“That the Commission has promulgated a not-yet-adopted amendment that is very likely to be adopted and that would result in reduced Guidelines ranges does not render a district court’s failure to grant a variance substantively unreasonable.”).

**AFFIRMED.**