

APR 20 2012

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NOT FOR PUBLICATION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.

MANUEL PINEDA-FERNANDEZ,
a.k.a. Jorge Pineda-Fernandez,

Defendant - Appellant.

No. 10-50591

D.C. No. 3:10-cr-02276-LAB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Submitted April 17, 2012**

Before: LEAVY, PAEZ, and BEA, Circuit Judges.

Manuel Pineda-Fernandez appeals from the 70-month sentence imposed following his guilty-plea conviction for attempted entry after deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and

* 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).

we affirm.

Pineda-Fernandez contends that the district court erred in applying a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A), because assault with a deadly weapon under section 245(a) of the California Penal Code is not a categorical crime of violence. This contention is foreclosed by *United States v. Grajeda*, 581 F.3d 1186, 1197 (9th Cir. 2009). Pineda-Fernandez’s argument that we are not bound by *Grajeda* in light of the subsequent case of *Johnson v. United States*, 130 S. Ct. 1265 (2010), is without merit. See *Newdow v. Lefevre*, 598 F.3d 638, 644 (9th Cir. 2010) (a three-judge panel may ignore circuit precedent only where it is “clearly irreconcilable” with intervening higher authority); *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1086 (9th Cir. 2010) (concluding that *Johnson*, which concerned a statute “akin to California's simple battery statute,” did not undermine the court’s prior conclusion that a conviction for willful infliction of corporal injury upon a spouse or cohabitant was a categorical crime of violence).

AFFIRMED.