

MAY 18 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NOT FOR PUBLICATION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.

JAVIER HERNANDEZ-PEREZ, a.k.a.
Ricardo Jimenez Hernandez,

Defendant - Appellant.

No. 10-10582

D.C. No. 2:10-cr-00929-GMS

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, District Judge, Presiding

Submitted May 15, 2012 **

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

Javier Hernandez-Perez appeals from the 33-month sentence imposed following his guilty-plea conviction for reentry of a removed alien, 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).

Hernandez-Perez contends that the district court failed to recognize its authority to reject the illegal reentry Guideline's prior-conviction sentencing enhancement on policy grounds. The record belies this contention. The district court considered Hernandez-Perez's policy and other mitigation arguments, recognized that the Guidelines are advisory, imposed a sentence that was 24 months below the advisory Guidelines range, and found the circumstances insufficient to justify a shorter sentence. *See United States v. Ayala-Nicanor*, 659 F.3d 744, 752-53 (9th Cir. 2011).

Hernandez-Perez's contention that his prior conviction for making a criminal threat, in violation of section 422 of the California Penal Code, is not categorically a crime of violence is foreclosed. *See United States v. Villavicencio-Burruell*, 608 F.3d 556, 563 (9th Cir. 2010).

AFFIRMED.