

OCT 10 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NOT FOR PUBLICATION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.

ROBERTO GARCIA-GARCIA, a.k.a.
Enrique Garcia-Garcia,

Defendant - Appellant.

No. 11-50544

D.C. No. 3:10-cr-02961-GT

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding

Submitted October 9, 2012**

Before: RAWLINSON, MURGUIA, and WATFORD, Circuit Judges.

Roberto Garcia-Garcia appeals from the 57-month sentence imposed following his guilty-plea conviction to 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.

* 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 vacate and remand for resentencing.

The parties agree, and we concur, that the district court erred in imposing a 16-level increase in Garcia-Garcia's base offense level under U.S.S.G.

§ 2L1.2(b)(1)(A)(i), because the documentation submitted by the government did not provide clear and convincing evidence that Garcia-Garcia had a prior drug-trafficking conviction. *See United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1050 (9th Cir. 2003) (government must prove prior conviction by clear and convincing evidence when it seeks a 16-level sentencing enhancement).

Accordingly, we vacate the judgment and remand for resentencing. Given the government's representation that the documents in the record are the only available documents concerning Garcia-Garcia's prior offense, on remand the district court is directed to calculate the advisory Sentencing Guidelines range by applying an enhancement of no more than eight levels under U.S.S.G. § 2L1.2(b).

Garcia-Garcia's request for judicial notice is granted.

The clerk shall issue the mandate forthwith.

VACATED and REMANDED.