

DEC 31 2012

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>JUAN CARLOS HERNANDEZ- HERNANDEZ,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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No. 11-50192

D.C. No. 3:10-cr-02027-MMA

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Submitted December 19, 2012**

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

Juan Carlos Hernandez-Hernandez appeals from the district court’s judgment and challenges the 51-month sentence imposed following his guilty-plea conviction for three counts of bringing in illegal aliens for financial gain and aiding

* 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).

and abetting, in violation of 8 U.S.C. §§ 2 and 1324(a)(2)(B)(ii); and three counts of bringing in illegal aliens without presentation, in violation of 8 U.S.C.

§ 1324(a)(2)(B)(iii). We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

Hernandez-Hernandez contends that the district court procedurally erred by failing to consider the 18 U.S.C. § 3553(a) sentencing factors when imposing sentence below the mandatory minimum pursuant to 18 U.S.C. § 3553(e). This contention is foreclosed by *United States v. Jackson*, 577 F.3d 1032, 1036 (9th Cir. 2009).

Hernandez-Hernandez also contends that he was denied his right of allocution under Fed. R. Crim. P. 32(i)(4)(A)(ii). We agree with the parties that the district court failed to afford Hernandez-Hernandez the right to allocute at sentencing, and that the error was not harmless because the court could have imposed a shorter sentence by departing further under U.S.S.G. § 5K1.1. *See United States v. Gunning*, 401 F.3d 1145, 1149 (9th Cir. 2005). Accordingly, we vacate the sentence and remand for resentencing so that the district court may afford Hernandez-Hernandez the opportunity to allocute.

VACATED and REMANDED.