

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN 29 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MANUEL OSMAN NEVAREZ-
CAJIGAS,

Defendant - Appellant.

No. 11-10375

D.C. No. 4:11-cr-00565-CKJ
District of Arizona,
Tucson

ORDER

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

The government's unopposed motion to recall the mandate and amend the decision to alter the remedy is granted.

The mandate is recalled and the memorandum disposition filed on March 5, 2012, is withdrawn.

A replacement memorandum disposition is being filed concurrently with this order, and the mandate shall reissue forthwith.

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MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Ronald S.W. Lew,** District Judge, Presiding

Submitted February 21, 2012***

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

Manuel Osman Nevarez-Cajigas appeals from the 13-month-and-one-day

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Ronald S.W. Lew, District Judge for the U.S. District Court for the Central District of California, sitting by designation.

*** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

sentence imposed following his guilty-plea conviction for possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D). We have jurisdiction under 28 U.S.C. § 1291, and we affirm without prejudice to an application by Nevarez-Cajigas to the district court to vacate his sentence and resentence him consistent with this decision.

Nevarez-Cajigas contends that the district court procedurally erred by failing to calculate the applicable Sentencing Guidelines range at the outset of the sentencing hearing, and by imposing a “standard” sentence rather than one based upon the 18 U.S.C. § 3553(a) sentencing factors. We conclude that the district court procedurally erred by failing to calculate the Guidelines range, and by failing adequately to consider the § 3553(a) factors. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Accordingly, Nevarez-Cajigas is entitled to be resentenced. However, the district court cannot sentence Nevarez-Cajigas at this time because he has been released and deported. We accordingly affirm the sentence imposed by the district court, but do so without prejudice to an application by Nevarez-Cajigas to the district court to vacate his sentence and resentence him consistent with this decision at such time, if ever, that he is in this country and available for resentencing. *See United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1065 (9th Cir. 2004).

Nevarez-Cajigas' motion to file an untimely reply brief is granted.

AFFIRMED.