

FEB 26 2014

MOLLY C. DWYER, CLERK
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NOT FOR PUBLICATION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>OSCAR ALEJANDRO GARCIA-LUQUIN,</p> <p style="text-align: center;">Defendant - Appellant.</p>

No. 13-10215

D.C. No. 2:12-cr-00304-LDG

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Submitted February 18, 2014**

Before: ALARCÓN, O’SANNLAIN, and FERNANDEZ, Circuit Judges.

Oscar Alejandro Garcia-Luquin appeals from the district court’s judgment and challenges the 40-month sentence imposed following his guilty-plea conviction for being a deported alien found unlawfully in the United States, in

* 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).

violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand for resentencing.

Garcia-Luquin contends that the district court erred by failing to recognize its discretion to vary downward from the Guidelines range to account for the government's failure to move for a third-level reduction for acceptance of responsibility. Effective November 1, 2013, U.S.S.G. § 3E1.1 was amended to clarify that "[t]he government should not withhold [a motion for reduction for acceptance of responsibility] based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal." U.S.S.G. § 3E1.1 cmt. n.6. The government concedes, and we agree, that Garcia-Luquin is entitled to a new sentencing hearing at which the government will move for the third level.

In light of our decision, we do not reach Garcia-Luquin's contention that the 40-month sentence is substantively unreasonable.

VACATED and REMANDED for resentencing.