

FILED

SEP 28 2016

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARCO SANCHEZ-FERNANDEZ,
AKA Marcos Fernandes Sanchez, AKA
Marcos Sanchez-Fernandez, AKA Rene
Sanchez-Flores,

Defendant-Appellant.

No. 15-10291

D.C. No.

4:14-cr-02029-CKJ-CRP-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona

Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted September 13, 2016
San Francisco, California

Before: W. FLETCHER, CHRISTEN, and FRIEDLAND, Circuit Judges.

Marco Sanchez-Fernandez appeals from his sentence for illegal reentry, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The district court concluded that Sanchez-Fernandez’s prior conviction for possession of narcotics for sale in violation of Arizona Revised Statute § 13-3408(A)(2) was a “drug trafficking offense” under United States Sentencing Guidelines (U.S.S.G.) § 2L1.2(b)(1)(A)(i), and applied a 16-level enhancement. That Arizona statute is not a categorical match with the federal generic definition because it criminalizes possession for sale of certain substances that are not federally controlled. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1990–91 (2015); *see also United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012) (holding that a California statute criminalizing possession or purchase of non-federally controlled substances was categorically broader than the definition of “drug trafficking offense” under U.S.S.G. § 2L1.2). When Sanchez-Fernandez was sentenced, neither the district court nor the parties had the benefit of *Mathis v. United States*, 136 S. Ct. 2243 (2016). Because an Arizona jury would not be required to find which narcotic drug a defendant possessed to render a conviction for § 13-3408(A)(2), *see Rev. Ariz. Jury Instructions (Criminal)*, 34.082 (3d ed.), the statute is indivisible. *See Mathis*, 136 S. Ct. at 2256–57; *Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015). The district court—not having been put on notice of the issue by an objection on this ground—committed plain error by applying a sentencing enhancement based on Sanchez-Fernandez’s conviction

under this statute. *See Mathis*, 136 S. Ct. at 2257. We reverse the sentence imposed by the district court and remand for resentencing without the enhancement. We need not reach Sanchez-Fernandez's other arguments in light of our reversal on this ground.

REVERSED and REMANDED.