

OCT 04 2016

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NOT FOR PUBLICATION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.

DAMASO ARELLANES-ZARATE,

Defendant-Appellant.

No. 16-50055

D.C. No. 3:15-cr-02709-LAB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Submitted September 27, 2016**

Before: TASHIMA, SILVERMAN, and M. SMITH, Circuit Judges.

Damaso Arellanes-Zarate appeals from the district court's judgment and challenges the 18-month sentence imposed following his guilty-plea conviction for improper entry by an alien, in violation of 8 U.S.C. § 1325. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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

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

Arellanes-Zarate contends that the district court erred by basing the sentence on unreliable hearsay contained in the presentence report (“PSR”). Contrary to Arellanes-Zarate’s claim, he did not object to the hearsay statements concerning his prior convictions. Thus, the district court did not err by relying on the PSR’s account of his criminal history at sentencing. *See United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc) (“district court may rely on undisputed statements in the PSR at sentencing”); *see also United States v. Charlesworth*, 217 F.3d 1155, 1160 (9th Cir. 2000) (district court may consider unobjected-to statements contained in the PSR).

Arellanes-Zarate also contends that the district court erred by failing to provide notice under Federal Rule of Criminal Procedure 32(h) of its intent to vary above the Guidelines range. As he concedes, this argument is foreclosed by *Irizarry v. United States*, 553 U.S. 708 (2008).

The government’s motion for judicial notice is denied.

AFFIRMED.