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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NOT FOR PUBLICATION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-Appellant,

v.

JESUS LOPEZ,

Defendant-Appellee.

No. 15-10406

D.C. No. 1:09-cr-00299-LJO

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O’Neill, District Judge, Presiding

Submitted October 25, 2016**

Before: LEAVY, GRABER, and CHRISTEN, Circuit Judges.

The government appeals from the district court’s order granting Jesus Lopez’s motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

* 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).

The government argues that the district court lacked authority to reduce Lopez's sentence to 151 months. In light of our recent decision in *United States v. Ornelas*, 825 F.3d 548 (9th Cir. 2016), we agree. In determining the “applicable guidelines range” under U.S.S.G. § 1B1.10, the district court improperly considered the downward departure that Lopez received at his original sentencing hearing under section 4A1.3(b). *See id.* at 554-55. The district court should have used the amended base offense level of 33 paired with the pre-departure criminal history category of III, which results in an amended guidelines range of 168 to 210 months. Although Lopez disagrees with the holding in *Ornelas*, he concedes that it precludes a reduction of his sentence below 168 months. *See* U.S.S.G. § 1B1.10(b)(2)(A); *Ornelas*, 825 F.3d at 555.

This court has already rejected Lopez's argument that this application of U.S.S.G. § 1B1.10(b) violates the Ex Post Facto Clause of the United States Constitution. *See United States v. Waters*, 771 F.3d 679, 680-81 (9th Cir. 2014); *see also Ornelas*, 825 F.3d at 555 n.9 (noting rejection). Accordingly, we vacate and remand for resentencing consistent with our decision in *Ornelas*.

VACATED and REMANDED for resentencing.