

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2018

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 16-30175

Plaintiff-Appellee,

D.C. No. 1:11-cr-00240-BLW

v.

MEMORANDUM*

MARTIN CANTU RUIZ,

Defendant-Appellant.

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

B. Lynn Winmill, Chief Judge, Presiding

Submitted August 15, 2018**

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

Martin Cantu Ruiz appeals from the district court's judgment and challenges the 120-month sentence imposed following his jury-trial conviction for unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). 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 parties agree that the district court erred in concluding that Ruiz’s prior conviction for battery on a corrections officer, in violation of Idaho Code § 18-903 and 915(c) (2005), is a categorical crime of violence for purposes of U.S.S.G. § 2K2.1(a). However, the government fails to address whether Idaho Code § 18-915(c), which incorporates the three different definitions of battery stated in Idaho Code § 18-903, is divisible and subject to the modified categorical approach. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1036 (9th Cir. 2017) (en banc) (“If a categorically overbroad statute . . . is divisible, then it is subject to the modified categorical approach.”). In addition, the documents of conviction for Ruiz’s battery conviction are not part of the record. Accordingly, we remand to permit the district court to determine in the first instance whether Idaho Code § 18-915(c) is divisible and, if so, whether Ruiz’s conviction under that section is a crime of violence under the modified categorical approach. If the court determines that the statute is indivisible, or that Ruiz’s conviction is not a crime of violence under the modified categorical approach, it shall resentence Ruiz using a base offense level of 22 to calculate the applicable Guidelines range.

VACATED and REMANDED.