

NOT FOR PUBLICATION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. 17-10162

Plaintiff-Appellee,

D.C. No. 4:16-cr-01672-JGZ

v.

MEMORANDUM\*

JIMMY HERNANDEZ-VENEGAS, a.k.a.  
Jimmy Gutierrez Venegas,

Defendant-Appellant.

Appeal from the United States District Court  
for the District of Arizona  
Jennifer G. Zipps, District Judge, Presiding

Submitted August 15, 2018\*\*

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

Jimmy Hernandez-Venegas appeals from the district court's judgment and challenges the 46-month sentence imposed following his guilty-plea conviction for reentry of a removed alien, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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\* 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).

Hernandez-Venegas first contends that the district court's use of the 2016 Guidelines Manual, in effect at the time of his sentencing, rather than the 2015 Guidelines Manual, in effect at the time of his offense, constituted an ex post facto violation. Because Hernandez-Venegas did not raise this claim in the district court, we review for plain error.<sup>1</sup> *See United States v. Chea*, 231 F.3d 531, 535 (9th Cir. 2000). In light of the district court's sentencing explanation, Hernandez-Venegas has not shown that any error affected his substantial rights because he cannot show a reasonable probability that he would have received a different sentence absent the alleged error. *See United States v. Dallman*, 533 F.3d 755, 762 (9th Cir. 2008).

Hernandez-Venegas next contends that, even if the court properly used the 2016 Guidelines Manual, his sentence is procedurally and substantively unreasonable because the district court mistakenly believed that Hernandez-Venegas would face a 16-level enhancement and a longer sentencing range under the 2015 Guidelines. We find no reversible error because the court's alleged mistake did not affect its sentencing decision. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Though the court observed that Hernandez-

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<sup>1</sup> Hernandez-Venegas argues that we should not apply the plain error standard of review because the issue is a pure question of law and there is no prejudice to the opposing party. We decline to consider this argument because it was raised for the first time in the reply brief. *See United States v. Mejia-Pimental*, 477 F.3d 1100, 1105 n.9 (9th Cir. 2007).

Venegas would have faced a higher Guidelines range under the 2015 Guidelines Manual, the record reflects that the court based the sentence on Hernandez-Venegas's immigration and criminal history, particularly the fact that he had illegally reentered the United States just 5 months after completing a 46-month sentence for his most recent immigration conviction. In light of these circumstances and the 18 U.S.C. § 3553(a) sentencing factors, the court did not abuse its discretion by imposing another 46-month sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

**AFFIRMED.**