

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 19 2013

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERWIN ALVARADO,

Defendant - Appellant.

No. 11-10622

D.C. No. 4:11-cr-02002-JGZ-
BPV-1

District of Arizona,
Tucson

ORDER

Before: WARDLAW, CLIFTON, and N.R. SMITH, Circuit Judges.

The parties' joint motion to affirm the district court without prejudice to resentencing is granted. The memorandum disposition filed on September 14, 2012, is withdrawn. A replacement memorandum disposition is filed concurrently with this order.

The petition for rehearing en banc is denied as moot.

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NOT FOR PUBLICATION

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<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>ERWIN ALVARADO,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Submitted September 10, 2012**

Before: WARDLAW, CLIFTON, and N.R. SMITH, Circuit Judges.

Erwin Alvarado appeals from the 24-month sentence imposed following his guilty-plea conviction for illegal re-entry after deportation, in violation of 8 U.S.C. § 1326.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

Alvarado asserted that the district court erred by not sua sponte granting him a third-level reduction for acceptance of responsibility. He argued that the reason cited by the government for refusing to make the motion for the reduction, that he reserved his right to appeal, was an impermissible reason under U.S.S.G. § 3E1.1(b).

Effective November 1, 2013, U.S.S.G § 3E1.1 was amended to clarify that “[t]he government should not withhold [a motion for a third-level reduction for acceptance of responsibility] based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal.” U.S.S.G § 3E1.1, cmt. n.6. The parties have filed a joint motion indicating that resentencing is warranted in light of this amendment, but requesting nevertheless that the sentence be affirmed without prejudice because Alvarado has been released and removed from the United States. Accordingly, because Alvarado has been removed from the United States, we affirm the sentence imposed by the district court, but do so without prejudice to a later request by Alvarado for a resentencing if he returns to the United States. *See United States v. Aguilar-Reyes*, 723 F.3d 1014, 1017-18 (9th Cir. 2013).

AFFIRMED without prejudice and with instructions.