

JUN 29 2012

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NOT FOR PUBLICATION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.

SAUL RIVAS-MENESES,

Defendant - Appellant.

No. 11-50469

D.C. No. 3:11-cr-01757-JAH

MEMORANDUM*

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

Submitted June 26, 2012**

Before: SCHROEDER, HAWKINS, and GOULD, Circuit Judges.

Saul Rivas-Meneses appeals from the 40-month sentence imposed following his guilty-plea conviction for attempted entry after deportation, in violation of 8 U.S.C. § 1326. 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 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).

Rivas-Meneses contends that the district court erred in failing to grant his request for a third-level reduction under U.S.S.G. § 3E1.1(b) because his refusal to waive his right to appeal was an improper basis for the government to refuse to move for the reduction. This argument is foreclosed by *United States v. Johnson*, 581 F.3d 994, 1002-04 (9th Cir. 2009). We decline Rivas-Meneses's request that we call for en banc review to reconsider *Johnson*.

Rivas-Meneses's unopposed motion for judicial notice, filed March 16, 2012, is granted.

AFFIRMED.