

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 31 2017

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 16-50011

Plaintiff-Appellee,

D.C. No. 8:15-cr-00072-CJC

v.

MEMORANDUM*

GERARDO ROSALES MARCIAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Submitted May 24, 2017**

Before: THOMAS, Chief Judge, and SILVERMAN and RAWLINSON,
Circuit Judges.

Gerardo Rosales Marcial appeals from the district court's judgment and challenges the 48-month sentence imposed following his guilty-plea conviction for being an illegal alien found in the United States following 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 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).

Marcial contends that the district court erred by applying a 16-level enhancement to his offense level under U.S.S.G. § 2L1.2(b)(1)(A)(ii) (2015) because his prior conviction for making a criminal threat, in violation of California Penal Code § 422, is not a “crime of violence.” As Marcial acknowledges, this argument is foreclosed. *See United States v. Villavicencio-Burrueal*, 608 F.3d 556, 563 (9th Cir. 2010). We remain bound by *Villavicencio-Burrueal*. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (three-judge panel is bound by circuit precedent unless that precedent is “clearly irreconcilable” with intervening higher authority).

AFFIRMED.