

DEC 28 2007

CATHY A. CATTERSON, 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NOT FOR PUBLICATION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.

RICARDO CUEVAS-TORRES,

Defendant - Appellant.

No. 05-50727

D.C. No. CR-04-02839-1-WQH

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted December 3, 2007**

Before: GOODWIN, WALLACE, and FISHER, Circuit Judges.

Ricardo Cuevas-Torres appeals from the judgment and 96-month sentence imposed after his jury-trial conviction for being a deported alien found in the United States, 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 finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Cuevas-Torres contends the district court erroneously enhanced his sentence beyond the two-year statutory maximum term by finding that Cuevas-Torres was deported subsequent to an aggravated felony conviction, even though the deportation was neither alleged in the indictment nor admitted by Cuevas-Torres. The record belies this contention, because the indictment does allege that Cuevas-Torres was deported on a date subsequent to his aggravated felony conviction. To the extent Cuevas-Torres contends the indictment must allege the exact date of his deportation, that contention is foreclosed by *United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1094 (9th Cir. 2007) (affirming sentence, given evidence at trial of deportations that occurred only after prior conviction).

Cuevas-Torres's challenges to the constitutionality and applicability of 8 U.S.C. § 1326(b) are foreclosed. *See id.* at 1092-93; *United States v. Covian-Sandoval*, 462 F.3d 1090, 1096-97 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1866 (2007).

AFFIRMED.