NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. AQUILEO MELCHOR-ZARAGOZA, Defendant - Appellant.	No. 06-15680 D.C. Nos. CV-04-02766-JAT CR-01-00017-JAT MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Submitted February 26, 2008**

Before: BEEZER, FERNANDEZ, and McKEOWN, Circuit Judges.

Aquileo Melchor-Zaragoza appeals from the district court's order denying his 28 U.S.C. § 2255 motion challenging his jury-trial conviction and 411-month

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

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, Melchor-Zaragoza's request for oral argument is denied.

sentence. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Melchor-Zaragoza contends that the superseding indictment improperly joined distinct and separate offenses in the same counts, and improperly charged multiple offenses based on the same underlying conduct. He contends that these alleged errors, combined with the jury instructions, resulted in an improper constructive amendment of the indictment. However, the record belies the contention that separate offenses were charged in the same count. *See United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir 1976). Further, because each count requires proof of an additional element that the others do not, the counts are not multiplicitous. *See United States v. Arlt*, 252 F.3d 1032, 1038-39 (9th Cir. 2001) (en banc). We conclude that the district court did not constructively amend the indictment. *See United States v. Adamson*, 291 F.3d 606, 615-16 (9th Cir. 2002).

Melchor-Zaragoza also contends that the superseding indictment improperly mixed elements of two distinct offenses defined under 18 U.S.C. § 924(c). This contention is foreclosed. *See United States v. Arreola*, 467 F.3d 1153, 1161 (9th Cir. 2006); *Adamson*, 291 F.3d at 615-16.

Melchor-Zaragoza's request for appointment of counsel is denied.

AFFIRMED.