

JAN 22 2008

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NOT FOR PUBLICATION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.

AMPELIO JIMENEZ-CARDENAS,

Defendant - Appellant.

No. 06-30475

D.C. No. CR-05-00177-EFS

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of Washington  
Edward F. Shea, District Judge, Presiding

Submitted January 14, 2008\*\*

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

Ampelio Jimenez-Cardenas appeals from the 40-month sentence imposed following his guilty-plea conviction for being an alien in the United States after

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\* 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).

deportation in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Jimenez-Cardenas contends that 8 U.S.C. § 1326(b) should be construed to require that a defendant admit or a jury find that a defendant was removed subsequent to a prior felony conviction. Even if the district court erred in applying the § 1326(b) enhancement by relying on facts not either admitted by Jimenez-Cardenas or proven to a jury, we conclude that any error was harmless. *See United States v. Salazar-Lopez*, 506 F.3d 748, 755 (9th Cir. 2007). The record includes ample evidence to demonstrate that Jimenez-Cardenas was previously removed subsequent to a felony drug-trafficking conviction. *See id.*

Jimenez-Cardenas also contends that allowing judicial fact-finding to increase the statutory maximum under § 1326(b) violates the Fifth and Sixth Amendments of the United States Constitution, and that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is invalid. These contentions are foreclosed. *See United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006).

**AFFIRMED.**