

MAR 06 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MESDRAIN MORFIN-MUNOZ,

Defendant - Appellant.

No. 05-30580

D.C. No. CR-02-00206-HA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Submitted February 26, 2008**

Before: BEEZER, FERNANDEZ and McKEOWN, Circuit Judges.

Mesdrain Morfin-Munoz appeals from the district court's determination, upon limited remand pursuant to *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2003) (en banc), that it would not have imposed a materially different sentence

* 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).

under advisory Guidelines. We have jurisdiction pursuant to 28 U.S.C. § 1291.

Morfin-Munoz contends that the district court erred by calculating his advisory Sentencing Guidelines sentence based on a quantity of methamphetamine that was neither admitted by him nor found by a jury beyond a reasonable doubt. We reject this contention because the district court was entitled to rely on facts it found by a preponderance of the evidence. *See United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006).

The district court did not solicit the views of counsel before deciding whether to re-sentence Morfin-Munoz under *United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005). This error requires us to re-remand the case for compliance with *Ameline*. *See United States v. Montgomery*, 462 F.3d 1067, 1069 (9th Cir. 2006).

REMANDED.