

JUL 28 2008

MOLLY C. DWYER, 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NOT FOR PUBLICATION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.

ARTURO PEREZ-MORALES,

Defendant - Appellant.

No. 06-30310

D.C. No. CR-05-00285-1-MO

SUPPLEMENTAL
MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Submitted February 9, 2007**
Portland, Oregon

Before: THOMPSON and BYBEE, Circuit Judges, and MILLS,*** District Judge.

The facts and procedure of the case are known to the parties, and we do not repeat them here. Arturo Perez-Morales raised several challenges to his conviction

* 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).

*** The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

and sentence. We previously ruled on all but one of these challenges. *See United States v. Perez-Morales*, 221 Fed. App'x 545 (9th Cir. 2007). We deferred ruling on Perez-Morales' sentencing challenge pending resolution of *Claiborne v. United States*, 127 S. Ct. 2245 (2007) (mem.), and *Rita v. United States*, 127 S. Ct. 2456 (2007). *Perez-Morales*, 221 Fed. App'x at 546. For the reasons set forth below, we now affirm the sentence of the district court.

We will only set aside a sentence when it is procedurally erroneous or substantively unreasonable. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Perez-Morales argues that the district court erroneously treated the Guidelines as presumptively correct instead of advisory. *See Carty*, 520 F.3d at 993. We disagree. After calculating Perez-Morales' sentence under the Guidelines, the district court stated that the Guidelines are "just an advisory range, and only taken as one factor among many that I should consider under [18 U.S.C.] § 3553." The district court then considered the mitigating factors presented by Perez-Morales and tailored his sentence to his individual crime and his individual characteristics. *See id.* at 994.

Perez-Morales also argues that the district court improperly "double-counted" his prior drug trafficking conviction to enhance his criminal history score and to raise the guideline offense level. We disagree. Sentencing courts are

permitted to use a defendant's prior felony conviction as the basis for an increase and in calculating a defendant's criminal history score. *See United States v. Luna-Herrera*, 149 F.3d 1054, 1056 (9th Cir. 1998).

For the foregoing reasons, we **AFFIRM** the sentence of the district court.