

JUL 31 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NOT FOR PUBLICATION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.

JOSE ARMENTA-ALCANTAR,

Defendant - Appellant.

No. 07-10279

D.C. No. CR-06-01438-FRZ

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Submitted July 22, 2008**

Before: B. FLETCHER, THOMAS, and WARDLAW, Circuit Judges.

Jose Armenta-Alcantar appeals from the 60-month sentence imposed following his guilty-plea conviction for illegal re-entry after deportation, in

* 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).

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

Armenta-Alcantar contends that the government's refusal to move for an additional one level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b) is arbitrary and amounts to vindictive prosecution. The government's stated reason for not filing the motion was Armenta-Alcantar's refusal to plead pursuant to a fast-track plea agreement. The government's decision is not based on an unconstitutional motive, nor does it amount to arbitrary government action. *See United States v. Espinoza-Cano*, 456 F.3d 1126, 1138 (9th Cir. 2006) (finding nothing improper about the government providing an incentive to plea bargain).

AFFIRMED.