

SEP 28 2007

**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NOT FOR PUBLICATION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.

ROBERTO CAMPOS-HERRERA,

Defendant - Appellant.

No. 06-50674

D.C. No. CR-05-01651-JAH

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Submitted September 24, 2007**

Before: CANBY, TASHIMA, and RAWLINSON, Circuit Judges.

Roberto Campos-Herrera appeals from the 60-month sentence imposed by the district court following his guilty-plea conviction for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction

* 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).

pursuant to 28 U.S.C. § 1291.

Campos-Herrera contends that his attorney's failure at sentencing to challenge the application of 8 U.S.C. § 1326(b) based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), constituted ineffective assistance of counsel. We conclude that the record is sufficiently developed to allow us to consider and to reject Campos-Herrera's ineffective assistance of counsel claim on direct appeal. *See United States v. Labrada-Bustamante*, 428 F.3d 1252, 1260-61 (9th Cir. 2005). Campos-Herrera admitted pursuant to his guilty plea that he was removed on a date subsequent to the felony conviction used to enhance his sentence. Because the district court explicitly acknowledged that the removal date was not alleged in the indictment, Campos-Herrera cannot show a reasonable probability that the result of the proceeding would have been different had his counsel raised the issue. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Labrada-Bustamante*, 428 F.3d at 1261.

We review Campos-Herrera's sentence for plain error, *see United States v. Covian-Sandoval*, 462 F.3d 1090, 1093 (9th Cir. 2006), and we affirm. We reject Campos-Herrera's *Apprendi* challenge to his sentence. Even assuming that the district court's reliance on a prior removal that was not charged in the indictment was error under *Apprendi* and the error was plain, we conclude that the error did

not affect Campos-Herrera's substantial rights, because he admitted the date of the removal during the plea colloquy. *See Covian-Sandoval*, 462 F.3d at 1098-99. Further, in light of the admission, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Cotton*, 535 U.S. 625, 632-33 (2002). Accordingly, we conclude that relief is not warranted under the plain error standard of review. *See Covian-Sandoval*, 462 F.3d at 1098-99.

AFFIRMED.