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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. GUSTAVO LUQUE-QUEVEDO, Defendant - Appellant.	No. 08-10156 D.C. No. 4:07-cr-01596-FRZ MEMORANDUM[*]

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

Submitted March 18, 2009[**]

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Gustavo Luque-Quevedo appeals from the 57-month sentence imposed following his guilty-plea conviction for illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a). We have jurisdiction pursuant to 28 U.S.C.

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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).

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§ 1291, and we vacate and remand.

The government contends that Luque-Quevedo waived his right to argue that his prior conviction does not constitute a crime of violence and, in the alternative, that his claims should be denied under the doctrine of judicial estoppel. We conclude that Luque-Quevedo inadvertently forfeited his right to object, rather then intentionally relinquished that right, and therefore we review for plain error. *See United States v. Jimenez*, 258 F.3d 1120, 1123-24 (9th Cir. 2001). The doctrine of judicial estoppel is inapplicable because Luque-Quevedo's prior position was based on inadvertence or mistake. *See United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008).

Luque-Quevedo contends that his prior conviction for resisting arrest, in violation of Arizona Revised Statutes § 13-2508 does not constitute a crime of violence under the definition set forth by U.S.S.G. § 2L1.2, comment note 1(B)(iii). The record does not reflect whether Luque-Quevedo was convicted for violating § 13-2508(A)(1), which is a categorical crime of violence, *see Estrada-Rodriguez v. Mukasey*, 512 F.3d 517, 520 (9th Cir. 2007); *United States v. Narvaez-Gomez*, 489 F.3d 970, 976 (9th Cir. 2007), or convicted for violating § 13-2508(A)(2), which is not a categorical crime of violence under U.S.S.G. § 2L1.2.

Accordingly, the district court plainly erred by concluding based on the record before it that Luque-Quevedo had been convicted of a crime of violence. We vacate and remand for resentencing on an open record. *See United States v. Pimental-Flores*, 339 F.3d 959, 969 (9th Cir. 2003) ("[o]n resentencing, the burden is on the government to submit judicially-noticeable documents demonstrating the prior statute of conviction").

VACATED and REMANDED.