

APR 21 2010

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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NOT FOR PUBLICATION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.

MARIO ESPARZA-CRUZ,

Defendant - Appellant.

No. 09-50150

D.C. No. 3:08-CR-03513-LAB

MEMORANDUM*

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

Submitted April 5, 2010**

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

Mario Esparza-Cruz appeals from the 75-month sentence imposed following his guilty-plea conviction for importation of methamphetamine, in violation of

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

21 U.S.C. §§ 952, 960. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Esparza-Cruz contends that the district court erred by declining to apply a minor role adjustment pursuant to U.S.S.G. § 3B1.2 because the district court was improperly influenced by its disagreement with prosecutorial charging policies. Esparza-Cruz also contends that he did not have the control over the drug smuggling operation required to preclude application of the role adjustment. The district court did not err as the record reflects that the district court's denial was not based upon improper considerations. Among other things, the district court relied upon the fact that Esparza-Cruz was arrested with over two kilograms of methamphetamine. *See United States v. Hursh*, 217 F.3d 761, 770 (9th Cir. 2000); *see also United States v. Lui*, 941 F.2d 844, 849 (9th Cir. 1991).

We reject Esparza-Cruz's contention, raised for the first time in his reply brief, that the government is judicially estopped from arguing on appeal that a minor role adjustment was unwarranted when it had advocated for it during sentencing. *See United States v. Bussell*, 504 F.3d 956, 963 (9th Cir. 2007).

AFFIRMED.