

OCT 3 2011

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NOT FOR PUBLICATION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.

FRANCISCO REY SANDOVAL-
BUSTAMANTE,

Defendant - Appellant.

No. 10-10353

D.C. No. 4:09-cr-01224-FRZ

MEMORANDUM*

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

Submitted September 27, 2011**

Before: HAWKINS, SILVERMAN, and W. FLETCHER, Circuit Judges.

Francisco Rey Sandoval-Bustamante appeals from the 42-month sentence imposed following his guilty-plea conviction for reentry after deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and

* 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).

we affirm.

Sandoval-Bustamante contends that the district court erred by: (1) failing to identify the legal standard it used in denying his motion to continue sentencing for a psychological evaluation; (2) failing to adequately explain its decision to deny a departure for cultural assimilation; and (3) awarding only a two-level downward departure for imperfect duress under U.S.S.G. § 5K2.12. The record reflects that the district court did not procedurally err, and that the sentence is substantively reasonable in light of the totality of the circumstances and the 18 U.S.C. § 3553(a) sentencing factors. *See United States v. Carty*, 520 F.3d 984, 992-93 (9th Cir. 2008) (en banc).

Sandoval-Bustamante also contends the government's refusal to move for a third point reduction for acceptance of responsibility, under U.S.S.G. § 3E1.1(b), was arbitrary and capricious. The government's decision not to move for the third point was rational and not arbitrary, as Sandoval-Bustamante did not waive his right to appeal. *See United States v. Johnson*, 581 F.3d 994, 1002 (9th Cir. 2009).

We grant Sandoval-Bustamante's motion to file a late brief. We decline to consider issues raised for the first time in Sandoval-Bustamante's reply brief. *See Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) ("Issues raised for the first time in the reply brief are waived.").

AFFIRMED.