

OCT 27 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NOT FOR PUBLICATION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.

SERAFIN HERNANDEZ-GARCIA,

Defendant - Appellant.

No. 11-50089

D.C. No. 3:09-cr-01802-GT

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, District Judge, Presiding

Submitted October 25, 2011**

Before: TROTT, GOULD, and RAWLINSON, Circuit Judges.

Serafin Hernandez-Garcia appeals from the 33-month sentence imposed following his conviction for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* 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. Appellant. P. 34(a)(2).

Hernandez-Garcia contends that the district court improperly departed upward on the basis of criminal history when calculating his Guidelines range, and that the district court failed to provide the requisite reasoned explanation of the departure. This contention is without merit, where the record shows that district did not procedurally err and “any deviation from the applicable advisory guidelines range will be viewed as an exercise of the district court’s post-*Booker* discretion and reviewed only for reasonableness.” See *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006); see also *United States v. Ellis*, 641 F.3d 411, 421-22 (9th Cir. 2011) (affirming that “it is not necessary to consider whether the district court correctly applied U.S.S.G. § 4A1.3 ... [but] only whether the defendant’s ultimate sentence was reasonable”). In light of the totality of the circumstances and the 18 U.S.C. § 3553(a) sentencing factors, the sentence is substantively reasonable. See *Gall v. United States*, 552 U.S. 38, 51 (2007).

AFFIRMED.