

MAY 18 2012

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NOT FOR PUBLICATION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.

BERNARDO DELEON-TORRES,

Defendant - Appellant.

No. 11-50302

D.C. No. 3:10-cr-03751-BTM

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Submitted May 15, 2012**

Before: CANBY, GRABER, and M. SMITH, Circuit Judges.

Bernardo Deleon-Torres appeals from the 72-month sentence imposed following his bench-trial 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.

* 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).

§ 1291, and we affirm.

Deleon-Torres contends that the district court erred in calculating the applicable Guidelines range in that it improperly denied a downward departure for cultural assimilation. This argument fails because “it is the pre-departure Guidelines sentencing range that the district court must correctly calculate.”

United States v. Evans-Martinez, 611 F.3d 635, 643 (9th Cir. 2010). In any event, in light of Deleon-Torres’s criminal history, the court did not err in denying the departure. *See* U.S.S.G. § 2L1.2 cmt. n.8.

Deleon-Torres also contends that his sentence is substantively unreasonable in light of his cultural assimilation. The below-Guidelines sentence is substantively reasonable in light of the totality of the circumstances and the 18 U.S.C. § 3553(a) sentencing factors. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

Finally, Deleon-Torres concedes that his contentions that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be limited to its facts, that *Almendarez-Torres* has been overruled; and that 8 U.S.C. § 1326(b) is unconstitutional, are foreclosed by Ninth Circuit precedent. *See United States v. Salazar-Lopez*, 506 F.3d 748, 751 n.3 (9th Cir. 2007).

AFFIRMED.