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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>FRANCISCO JAVIER VALENZUELA- RAMIREZ,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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No. 13-10106

D.C. No. 4:12-cr-01633-RCC

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Timothy M. Burgess, District Judge, Presiding**

Submitted June 25, 2014***

Before: HAWKINS, TALLMAN, and NGUYEN, Circuit Judges.

Francisco Javier Valenzuela-Ramirez appeals from the district court’s judgment and challenges the 50-month sentence imposed following his guilty-plea

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

** The Honorable Timothy M. Burgess, United States District Judge for the District of Alaska, sitting by designation.

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

conviction for reentry after deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Valenzuela-Ramirez contends that the government refused to move for a third-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b) on the improper basis that he would not waive his appellate rights. A defendant who challenges the government's refusal to move for a third point for acceptance of responsibility must show that the government's refusal was based on an unconstitutional motive or was arbitrary. *See United States v. Espinoza-Cano*, 456 F.3d 1126, 1136 (9th Cir. 2006).

The sole reason the government proffered in the district court for its refusal to move for the third point was the “relatively substantial work” it had done in preparation for trial. The government “is in the best position to (1) know what *it* has and has not done in relation to trial preparation, and (2) assess whether the defendant's notification of an intent to plead guilty has assisted the government in avoiding trial preparation.” *Id.* There is nothing in the record to support Valenzuela-Ramirez's suggestion that the government misrepresented its trial preparation efforts or that it had a different motivation for declining to file the motion for the third point than the one it offered. We, therefore, affirm.

AFFIRMED.