



**ED STATES COURT OF APPEALS
THE EIGHTH CIRCUIT**

No. 01-2166 SIDM

CRIMINAL

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

ZENAIDO VASQUEZ-Resendiz,

Defendant/Appellant.

Appeal from the United States District Court for the
Southern District of Iowa
Honorable Robert Pratt, Judge

BRIEF OF APPELLEE

Inga Bumbary-Langston
United States Attorney

Ed Kelly
Assistant U.S. Attorney
110 E. Court Avenue, Suite 286
Des Moines, Iowa 50309
Tel: (515) 284-6410

Fax: (515) 284-6281

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Defendant appeals from a sentence for being an aggravated felon illegally present in the United States following earlier deportation. He was convicted upon his plea of guilty and appeals from the District Court's refusal to accept his motion to depart downwards from the prescribed guidelines range at sentencing. His allegation claims that as a matter of law, this court should reconsider Eighth Circuit precedent, that prohibits departure on his claim that the defendant will receive disparate treatment at the hands of the Bureau of Prisons during incarceration because he stands convicted as an illegal alien. This ground was refused by the District Court, following Eighth Circuit Precedent, as a matter of law. Neither a District Court, or another panel of this Court, may reverse the holding of another panel.

If the Court determines that it will consider the merits of the argument, oral argument should be granted. In such case as the court may consider the merits raised, ten minutes per side should be allowed for oral argument.

TABLE OF CONTENTS

SUMMARY AND REQUEST FOR ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	v
STATEMENT OF THE ISSUES	vi
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. THE DISTRICT COURT PROPERLY DENIED, ON LEGAL GROUNDS, DEFENDANT’S MOTION FOR DOWNWARD DEPARTURE ON CLAIMS HIS STATUS AS A DEPORTABLE ALIEN WOULD RESULT IN ADVERSE TREATMENT WHILE DEFENDANT IS IN CUSTODY OF THE BUREAU OF PRISONS	7
CONCLUSION	11
CERTIFICATES OF COMPLIANCE	12
CERTIFICATES OF VIRUS SCAN	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

Cases

Koon v. United States, 518 U.S. 81 (1996)	7-8, 10
United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir.2000)	10
United States v. Cardoza-Rodriguez, 241 F.3d 613 (8 th Cir. 2001)	3, 4, 7, 8, 10
United States v. Duenas-Moreno, (No. 00-2423, May 30, 2001, unpublished opinion), 2001 WL 575458 (8th Cir.(Iowa)).	3, 4
United States v. Evidente, 894 F.2d 1000 (8th Cir.), cert. denied, 495 U.S. 922 (1990).	6
United States v. Navarro, 218 F.3d 895 (8th Cir. 2000).	6
United States v. Nnanna, 7 F3d 420 (5th Cir. 1993)	9
United States v. Pozzy, 902 F.2d 133 (1st Cir.), cert. den., 498 U.S. 943 (1990).	8
United States v. Restrepo, 999 F.2d 640 (2d Cir. 1993)	8-9
United States v. Reynolds, 116 F.3d 328 (8th Cir.1997)	8
United States v. Saelee, 123 F.3d 1024 (8th Cir. 1997)	6
United States v. Sentamu, 212 F.3d 127 (2nd Cir. 2000)	10

Statutes, Guidelines, Rules & Other Authority

Title 8 USC § 1252(a)(2)(A) 9

Title 8 USC § 1326(a) & (b)(2). 1, 2, 3, 4

Title 18 U.S.C. §§ 922(g)(1), (g)(5) 3

Title 18 USC §3553(b). 7

Title 18 USC § 3624(c). 8, 9

Title 28 USC § 1291. v

Application note 5 to U.S.S.G. § 2L1.2. 3, 7

PRELIMINARY STATEMENT

This is an appeal by defendant of his conviction in the United States District Court for the Southern District of Iowa. Defendant pleaded guilty to violation of Title 8, § 1326, illegally being found in the United States after previous deportation. At sentencing before United States District Judge Robert Pratt, defendant unsuccessfully sought to receive a departure from his applicable guidelines sentence. The requested departure grounds was denied as a matter of law.

Notice of Appeal was timely filed by defendant. The United States Court of Appeals for the Eighth Circuit is founded in Title 28 USC § 1291.

STATEMENT OF THE ISSUES

I.

MAY A DISTRICT COURT DENY, ON LEGAL GROUNDS, A DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE ON CLAIMS HIS STATUS AS A DEPORTABLE ALIEN WILL RESULT IN HIS ADVERSE TREATMENT WHILE DEFENDANT IS IN THE CUSTODY OF THE BUREAU OF PRISONS?

United States v. Cardoza-Rodriguez, 241 F.3d 613 (8th Cir. 2001)

United States v. Reynolds, 116 F.3d 328 (8th Cir.1997)

United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir.2000)

United States v. Sentamu, 212 F.3d 127 (2nd Cir. 2000)

STATEMENT OF THE CASE

On November 15, 2000, Defendant ZENAIDO VASQUEZ-Resendiz was indicted for being illegally in the United States after deportation in violation of Title 8 USC § 1326(a) & (b)(2). Defendant pleaded guilty on January 23, 2001. On May 2, 2001 he was sentenced by United States District Judge Robert W. Pratt to a sentence of forty-six (46) months upon the finding he was an Aggravated Felon pursuant to United States Sentencing Guidelines.

At sentencing, Defendant moved for a downward departure from the Guidelines on grounds that as a result of his special status as a deportable alien, the defendant would suffer adverse disparate treatment. Defendant claimed that due to his ineligibility to participate in various Bureau of Prisons programs that might lower his time of imprisonment or allow service of his imprisonment under more favorable conditions his case was atypical.

The motion for downward departure was denied by the District Court. The court found it could not depart on defendant's claims that his status as an illegal alien would subject him to greater punishment while in custody of the Bureau of Prisons, due to prior circuit precedent deciding the issue adversely to defendant. The contemplated status urged for departing is within the very heartland of defendant's sentencing guideline, and applied to everyone in his condition. As the factor has been considered by the Sentencing Commission in fixing the Guideline, the Eighth Circuit has ruled that courts are foreclosed in departing on that basis. It is from these denials to depart that the Defendant appeals.

STATEMENT OF FACTS

ZENAIDO VASQUEZ-Resendiz ("Defendant") was convicted of illegally being present in the United States following his removal from the United States as an aggravated felon in violation of Title 8 USC § 1326(b) (2). The Defendant previously was removed from the United States on July 24, 1996, after an earlier conviction for drug trafficking, and subsequent the subsequent revocation of the earlier sentence in California in 1995. (P.S.I. 4).¹ However, within one year of his removal from the United States the Defendant returned to the United States. The Defendant was arrested in the Southern District of Iowa following this illegal entry, after fraudulently applying for INS papers on October 26, 2000. (P.S.I. 5).

The Defendant was indicted on November 15, 2000 and pleaded guilty on January 23, 2001, in the Iowa District Court. (P.S.I. 1 and 2).

The court found at sentencing that Defendant was subject to the penalties in Title 8, United States Code section 1326(b) (2). The only issue before the District Court was a one level downwards departure request which the defendant sought. The Defendant argued for the one level downwards departure from the relevant guidelines range upon his claim that as an alien he would be subjected to much harsher conditions while the defendant was serving his sentence in custody of the Federal Bureau of Prisons. Although Defendant conceded his argument in this case was contrary to current Eighth Circuit law, he advised the court that the identical issue was then awaiting determination of the Eighth Circuit in an unrelated appeal in another case² then awaiting argument by defendant's counsel and

¹ Reference is to the Pre-Sentence Investigation Report and to the applicable pages of the report.

² Counsel was making direct reference to *United States v. DUENAS-Moreno*, 8th Circuit m 00-2423, then on appeal and later decided after sentencing, on May 30, 2001 in an unpublished PER CURIAM opinion, reported at 2001 WL 575458 (8th Cir.(Iowa)) below:

the Assistant United States Attorney. Defendant stated to the Court that he wished to preserve the issue in this case for appeal, in the event of a reversal of the prior holding in *United States v. Cardoza-Rodriguez*, 241 F.3d 613 (8th Cir. 2001). (May 2, 2001 Sentencing Transcript at page 4), which was the issue in the Duenas-Moreno case.

Javier Duenas-Moreno pleaded guilty to illegal reentry into the United States following his previous arrest and deportation as an illegal alien, 8 U.S.C. §§ 1326, and to possessing a firearm after conviction for a felony and while being an illegal alien, 18 U.S.C. §§ 922(g)(1), (g)(5). At sentencing, he sought a downward departure from the applicable guideline range on the ground that because of his status as a deportable alien he would suffer adverse consequences while in the custody of the Bureau of Prisons. The District Court [The Hon. Robert Pratt, United States District Judge for the Southern District of Iowa] denied a downward departure, concluding as a matter of law that it lacked authority to depart on this ground. Duenas-Moreno appeals, arguing that the District Court erred in denying his motion for a downward departure. He argues that the substantial penal burdens imposed on him as a result of his alienage were not contemplated under the sentencing guidelines. We reject this argument. The circumstance Duenas-Moreno asserts to justify a downward departure, i.e., his status as a criminally deportable alien, was in fact considered by the Sentencing Commission as a predicate defining element for the applicable guideline, USSG Manual §§ 2L1.2 (2000), and applies to everyone in the same status as the defendant. Thus his status as a deportable alien cannot, as a matter of law, be considered a basis for departure. *United States v. Cardoso-Rodriguez*, 241 F.3d 613, 614 (8th Cir.2001). Moreover, Duenas-Moreno is unable to show that he is burdened by adverse penal consequences different from those imposed upon other deportable aliens sentenced under the same guideline.

The court rejected the departure request as a matter of law, based upon the reported holding in *Cardoza-Rodriguez*, 241 F.3d at 614.

Defendant was then sentenced under the aggravated felon provisions of § 1326(b)(2) and at the bottom of the applicable guideline, to forty six (46) months in prison.

On appeal, Defendant challenges the issues surrounding the district court's denial of his motion for a downward departure in sentencing.

SUMMARY OF THE ARGUMENT

Sentencing courts are to confine themselves to the guidelines set forth by the United States Sentencing Commission except in rare cases when aggravating or mitigating circumstances that the Commission did not adequately consider in constructing the guidelines are present. If such factors are present and takes the case out of the typical case making up the heartland of cases for that Guideline, departure may be considered.

The circumstance that Defendant claims to justify a downward departure, his categorical status as a deportable alien, was in fact considered by the Sentencing Commission as a distinct element for the Guideline prescribed for the Defendant's crime. As the categorical classification sought to justify departure was considered by the commission itself, it cannot, as a matter of law be considered a basis for departure. Defendant's circumstance are not atypical. They place him directly in the heartland of cases under the applicable guideline and he is thus not entitled to a downward departure as a matter of law as found by the District Court in following Eighth Circuit precedent.

ARGUMENT

Standard of Review

A decision by the District Court that departure from Sentencing Guidelines was unavailable as a matter of law is reviewable on appeal, but a decision as matter of discretion not to grant downward departure is not reviewable by the Court of Appeals. *United States v. Evidente*, 894 F.2d 1000, 1004 (8th Cir.), cert. denied, 495 U.S. 922 (1990). A "court's legally erroneous determination that it lacked authority to consider a particular mitigating factor" is reviewable. *United States v. Saelee*, 123 F.3d 1024, 1025 (8th Cir. 1997), *United States v. Navarro*, 218 F.3d 895, (8th Cir. 2000).

I

THE DISTRICT COURT PROPERLY DENIED, AS A MATTER OF LAW, DEFENDANT'S MOTION FOR A DOWNWARD DEPARTURE ON HIS CLAIM THAT HIS STATUS AS A DEPORTABLE ALIEN WOULD RESULT IN ADVERSE TREATMENT WHILE HE WAS IN CUSTODY OF THE BUREAU OF PRISONS.

At the sentencing the defendant sought a downwards departure from the applicable guideline, § 2L1.2, based upon a claim that all alien defendants normally face hardships, more onerous conditions of incarceration, and less program opportunities as aliens, than would be normally be encountered by other prisoners incarcerated in the Federal Bureau of Prisons. The United States argued that departures downwards on such a claim are foreclosed as a matter of law. The District Court denied the request for departure as a matter of law, citing this circuit's precedent, handed down only months earlier. The factor cited by defendant was considered by the sentencing commission, and applies in every illegal entry case involving aggravated felons, all of whom are subject to deportation, and no departure may be granted on such ground. *United States v. Cardoza-Rodriguez*, 241 F.3d 613, 614 (8th Cir. 2001). Departures are to be granted only when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence that is different from that prescribed." 18 USC §3553(b) (quoted in *United States Sentencing Guidelines*, §5K2.0 Grounds for Departure (Policy Statement)). For the sentencing court to legally have discretion to depart from the guidelines: 1) there must exist a mitigating or aggravating factor, and 2) that factor must not have been considered sufficiently by the Sentencing Commission when formulating the Guidelines. *Koon v. United States*, 518 U.S. 81 (1996).

The issue has been thoroughly examined. It has been decisively settled by this Court adversely to the defendant's cause in *United States v. Cardoza-Rodriguez*, *id.*

Although the defendant argues the *Cardoza-Rodriguez* decision was wrongfully decided, one panel of this court may not overrule an earlier panel's decision. See *United States v. Reynolds*, 116 F.3d 328, 329 (8th Cir.1997). Similarly, just as one panel cannot reverse the holding of another panel of this Court, it is beyond question that a District Court may not unilaterally do so.

Among other courts rejecting deportability as a basis for downward departure is *United States v. Restrepo*, 999 F.2d 640 (2d Cir. 1993) in the Second Circuit. There the court rejected the claim for a departure, which amounted to an indirect challenge to the Bureau of Prisons' policies relating to inmate classification, for three sound reasons.

[1] Even if it were a steadfast policy of the Bureau to deny reassignment to relaxed-security facilities to alien prisoners who must be deported on account of their convictions, we would consider that policy an inappropriate basis for departure from the imprisonment range prescribed by the Guidelines. Assuming that § 3624(c) was intended to apply to deportable aliens, the statute does not on its face require the Bureau to ensure that all prisoners participate in such a program, but only to do so if practicable. For example, the Bureau need not reassign the prisoner to a halfway house if there is no such unit in his home state, and the absence of such a facility has been held to be an impermissible ground for departure from the Guidelines, *United States v. Pozzy*, 902 F.2d 133, 140 (1st Cir.), cert. denied, 498 U.S. 943 (1990).

[2] More importantly, Congress has directed that upon release from prison, a deportable alien is not to be released back into the community, but must instead, pending deportation, be released to the custody of the Attorney General. See 8 USC § 1252(a)(2)(A) (1988 & Supp. III 1991). Given the focus of § 3624(c) on prisoners who are to reenter the community, it is arguable that Congress, having instructed that deportable aliens not be released into the community, did not mean § 3624(c) to apply to such aliens. Had Congress so stated, a court's disapproval of that policy choice would not be an appropriate basis for a departure from the Guidelines, for the court's attempt to palliate

that choice would encroach on the prerogative of the Legislative Branch. Considering the discretion that Congress has confided to the Bureau and the reasonableness of the Bureau's consideration of the fact that the prisoner will be deported following the completion of his term of imprisonment, we think the court's disapproval of the Bureau's exercise of its discretion to deny that prisoner reassignment to a minimum-security facility is likewise an inappropriate basis for departure.

[3] In any event, if there is a defect in the Bureau's policy toward reassignment of deportable aliens, the appropriate way to remedy that defect would be pursuit of an action that challenges such a policy head-on, not the ad hoc granting of departures that have the effect of creating the very type of disparity in sentencing that the adoption of the Guidelines was intended to eliminate.

United States v. Restrepo, 999 F.2d at 645-46. See also United States v. Nnanna, 7 F3d 420 (5th Cir. 1993) (collateral effects arising from status as alien, such as ineligibility for more lenient conditions and early release, are not basis for downward departure).

As the court in Restrepo noted, not all prisoners who are United States citizens are eligible for early release. In addition to prisoners not being eligible due to the lack of a halfway house in their home state, prisoners who have non-immigration detainers lodged against them likewise are ineligible for early

release to a halfway house. The Bureau of Prisons policy does not apply merely to deportable alien prisoners, but to all prisoners who have detainers lodged against them.

In the Koon analysis, the first question is supposed to be, "What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special or unusual case?" *Koon v. United States*, 518 U.S. 81, 95 (1996). The answer in this matter is that it is not atypical -- but typical of every other case under this Guideline. See *United States v. Bonnet-Grullon*, 212 F.3d 692 (2d Cir.2000). If departures unrelated to specific mitigating factors and events were to occur, the ruling that such departures are in general permissible, unrelated to particular characteristics of the individual defendant or to any special feature of his case, would have undermined the goal of reducing unwarranted disparities in the sentences of similarly situated defendants. See also, *United States v. Sentamu*, 212 F.3d 127, 138 (2nd Cir. 2000).

As the Defendant's particular mitigating factors cited in this case are squarely within the contemplation of the Guideline he was sentenced under, no departure upon the particular mitigating basis raised is permitted as a matter of law. *United States v. Cardoza-Rodriguez*, 241 F.3d at 614.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that District Court's denial of the request for downwards departures be upheld, and that the Defendant's conviction and sentence be affirmed.

United States of America
Inga Bumbarly-Langston
United States Attorney

Ed Kelly
Assistant United States Attorney
246 U. S. Courthouse Annex
110 E. Court Avenue
Des Moines, Iowa 50309
Tel: (515) 284-6410
Fax: (515) 284-6281

**CERTIFICATE OF COMPLIANCE AND
WORD PROCESSING PROGRAM**

I, the undersigned, hereby certify on the 20th day of July, 2001, that the Appellee's brief filed in the United States v. ZENAIDO VASQUEZ-Resendiz, Case No. 01-2166SIDM, complies with the type-volume limitation of Rule 32(a)(7)(B). The brief was typed using WordPerfect 9.0 software. A document information was run on the entire brief on this date and it reported: word count =2095 ; line count =220 . The brief was typed using Goudy Hand Tooled font, 14 pt.

United States of America

Ed Kelly
Assistant United States Attorney

U.S. Courthouse Annex, Suite 286
110 East Court Avenue
Des Moines, Iowa 50309
Tel: (515) 284-6410
Fax: (515) 284-6281

CERTIFICATE OF VIRUS SCAN OF DISKETTES

I, the undersigned, hereby certify that on the 20th day of July, 2001, the two diskettes labeled United States v. ZENAIDO VASQUEZ-Resendiz SIDM 01-2166 were scanned for viruses by using the Inoculan for Windows NT scan software program. The Inoculan for Windows NT scan program reported no viruses were found on either diskette. One of these diskettes is being sent to the United States Court of Appeals for the Eighth Circuit, the other is being sent to James A. Benzoni, counsel for the Appellant.

United States of America

Ed Kelly
Assistant United States Attorney

U.S. Courthouse Annex, Suite 286
110 East Court Avenue
Des Moines, Iowa 50309
Tel: (515) 284-6410
Fax: (515) 284-6281

CERTIFICATE OF SERVICE

I, Ed Kelly, do hereby certify that on the 20th day of July, 2001 I served two copies of Appellant's Brief on the Appellee, by depositing same in the United States Mail to the address listed below:

James A. Benzoni, Esquire
2912 Beaver Avenue
Des Moines, IA 50310

Ed Kelly
Assistant United States Attorney

U.S. Courthouse Annex, Suite 286
110 East Court Avenue
Des Moines, Iowa 50309
Tel: (515) 284-6410
Fax: (515) 284-6281