



D WAIVER OF ORAL ARGUMENT

PATRICIO MURILLO pleaded guilty to being an illegal alien found in the United States following deportation subsequent to a conviction for an aggravated felony in violation of 8 U.S.C. §§ 1326(a) and (b)(2). At sentencing, Mr. Murillo argued for downward departure on the basis of his extraordinary cultural assimilation in this country. The district court denied Mr. Murillo's request for a departure on this ground, essentially stating that it did not have the authority to depart. Mr. Murillo contends that the statements made by the district court indicate that the district court was unsure as to whether it had the authority to depart. Because Mr. Murillo believes that the issues in this appeal can be resolved on the basis of the briefs and record alone, Mr. Murillo does not request oral argument.

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JURISDICTIONAL STATEMENT

1. Patricio Murillo appeals from the judgment including sentence imposed by the Honorable Warren K. Urbom, United States Senior District Judge for the District of Nebraska, following Murillo's guilty plea. The case number below is 4:01CR3004.

2. Federal jurisdiction over the subject matter of this case is proper pursuant to 18 U.S.C. § 3231 and 8 U.S.C. § 1326.

3. The United States Court of Appeals for the Eighth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which provides for jurisdiction over a final order subject to appeal, and 18 U.S.C. § 3742, which provides for review of a federal sentence.

4. The judgment and sentence were entered on June 15, 2001. A timely notice of appeal was filed on June 25, 2001.

STATEMENT OF THE ISSUE

- I. WHETHER MR. MURILLO IS ENTITLED TO RESENTENCING BASED UPON THE DISTRICT COURT'S AMBIVALENCE AS TO WHETHER IT HAD THE AUTHORITY TO DEPART DOWNWARD

United States v. DeCora, 177 F.3d 676 (8th Cir. 1999)

United States v. Evidente, 894 F.2d 1000 (8th Cir.), *cert. denied*,
495 U.S. 922 (1990)

United States v. Lewis, 249 F.3d 793 (8th Cir. 2001)

United States v. Wesley, 990 F.2d 360 (8th Cir. 1993)

STATEMENT OF FACTS

Mr. Murillo was indicted was indicted for illegal reentry into the United States following deportation, a violation of 8 U.S.C. § 1326. Mr. Murillo pleaded guilty to the charge and sentencing was imposed on June 15, 2001. Mr. Murillo came to the United States approximately twelve (12) years ago at the age of twenty (20). He has developed strong cultural and psychological ties to the United States. His common law wife and three small children, ages seven (7) months, five (5) years, and eight (8) years, live in Phoenix, Arizona. Murillo has been with his wife for nine (9) years. Murillo resided in Phoenix up until ten (10) days prior to his arrest on December 10, 2000.

Based upon his extraordinary cultural assimilation, Mr. Murillo argued for a downward departure. At the sentencing proceedings, the district court wavered on the issue of whether cultural assimilation could be legitimate grounds for departure. When the prosecutor asked about whether the court was ruling whether cultural assimilation can never be grounds for departure, the following exchange occurred:

MR. EVERETT: As you know, at least it's my understanding the Eighth Circuit has not yet ruled on whether cultural assimilation can ever be grounds for a downward departure.

THE COURT: Yes.

MR. EVERETT: And I guess I'm wondering if you are ruling that it can never be grounds for a departure or –

THE COURT: No.

MR. EVERETT: – assuming that it could, this just isn't that case.

THE COURT: It's the latter. See, I have no call in this case to say it never can be. I don't know whether it can be. There are a myriad of factual circumstances that may permit it to be. This is not one of them, in my judgment. This is not one in which cultural assimilation, under the facts as I know them, could be, under our facts, grounds for departure. I think – I think, but again, this is not a holding, this is just a thought. The way I think about it is that in some crimes, cultural assimilation may be a justifiable fact for treating someone to a lesser penalty. I do not think – I do not think it is likely that cultural assimilation will be a legitimate one in reentry cases. I'm not saying it's unlikely. And I say, for this case, it would be inappropriate for me to use it. Does that mean it's a matter of discretion or not? I don't know. I don't really care. If I have the discretion, if I do have the discretion to grant it in this case, I exercise that in the direction of not granting downward departure. It may be that I don't have any discretion because this is a reentry case, and the facts in his case simply wouldn't allow the latter one. So I guess that's the best I can do, Mr. Everett. (Tr. at 16-17)¹.

The court subsequently denied Mr. Murillo's motion for downward departure on the basis of extraordinary cultural assimilation. The district court sentenced Mr. Murillo to 57 months, followed by three years of supervised release.

¹ "Tr." refers to the transcript of sentencing proceedings held before the Honorable Warren K. Urbom on June 15, 2001.

SUMMARY OF THE ARGUMENT

The district court's failure to recognize its power to depart downward justifies a new sentencing in this matter. Both the Sentencing Commission and the courts have repeatedly recognized a sentencing judge's broad discretion to depart from the Guidelines. *United States v. DeCora*, 177 F.3d 676, 678 (8th Cir. 1999). This discretion remains even when a particular factor has been specifically addressed by the Commission, so long as it is not a prohibited ground for departure. *See Koon v. United States*, 518 U.S. 81, 93 (1996).

When it is unclear whether the sentencing court believed it did not have the discretion to depart or whether the court simply chose not to depart, the uncertainty should be resolved in favor of the defendant. *United States v. Lewis*, 249 F.3d 793, 795 (8th Cir. 2001). The record in this case indicates that the sentencing court believed that it did not have the power to grant a downward departure. Because the district court was mistaken, this Court should remand the case to the district court for resentencing.

STANDARD OF REVIEW

This Court has authority to review a district court's refusal to grant a downward departure when the district court believed it had no power to depart. *See, e.g., United States v. Wesley*, 990 F.2d 360, 368 (8th Cir. 1993).

ARGUMENT

I. THE DISTRICT COURT’S MISTAKEN BELIEF THAT IT DID NOT HAVE THE AUTHORITY TO DEPART DOWNWARD BASED ON MR. MURILLO’S EXTRAORDINARY CULTURAL ASSIMILATION ENTITLES MR. MURILLO TO RESENTENCING.

When a district court believes it lacks power to exercise discretion, this Court has "jurisdiction either to confirm or reject the sentencing court's conclusion that it lacked authority to depart." *United States v. Evidente*, 894 F.2d 1000, 1005 (8th Cir.), *cert. denied*, 495 U.S. 922 (1990). This Court has also held that when it is unclear from the record whether the district court erroneously believed it did not have the discretion to depart or exercised its discretion by not departing, the case must be remanded for resentencing. *United States v. Lewis*, 249 F.3d 793, 795 (8th Cir. 2001).

The previously quoted exchange between the district court and the prosecutor indicates that the district court was unsure of whether it had the authority to depart in Mr. Murillo’s case. The court stated that it “didn’t know” and “didn’t care” whether downward departure on the basis of cultural assimilation was within its discretion. This uncertainty must be construed as grounds for remand and resentencing.

In order for a sentencing error to be harmless, it must be clear from the record that the district court would have imposed the same sentence despite its erroneous view of the law. *See, e.g., United States v. Gordon*, 974 F.2d 97, 101 (8th Cir. 1992).

It is unclear from the record in this case that Mr. Murillo would have received the same sentence had the district court understood its ability to depart downward. It is axiomatic that the amount of a departure is “quintessentially a judgment call” to be made by the district court. *DeCora*, 177 F.3d at 679. In this case, the district judge’s belief that he could not depart prevented him from making the judgment call to depart even further. To correct this error, and give the district court the opportunity to use his discretion under the guidelines to its fullest extent, this Court should remand for resentencing.

CONCLUSION

For the foregoing reasons, Patricio Murillo respectfully requests that his sentence be vacated and his case remanded for resentencing.

PATRICIO MURILLO, Appellant,

By _____

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NO. 01-2774

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

UNITED STATES OF AMERICA,
Appellee,

vs.

PATRICIO MURILLO,
Appellant.

CERTIFICATE OF SERVICE

Karen M. Shanahan, after being first duly sworn states:

1. She is the attorney for Appellant herein.
2. On the 22nd day of August, 2001, she served by prepaid, first class

United States mail, two copies of the Brief of Appellant on Alan Everett, Assistant
United States Attorney, at 487 Federal Building, 100 Centennial Mall North,
Lincoln, NE 68508-3865.

PATRICIO MURILLO, Appellant,

By

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NO. 01-2774

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

UNITED STATES OF AMERICA,
Appellee,

vs.

PATRICIO MURILLO,
Appellant.

CERTIFICATE OF COMPLIANCE

Karen M. Shanahan, after being first duly sworn, states:

1. The diskette accompanying the filing of the Appellant's Brief in this matter has been scanned for viruses and is virus-free.
2. Appellant's Brief in this matter is 5 pages in length, excluding the Certificate of Service and Certificate of Compliance, which complies with the page limit option found at Fed. R. App. P. 32(a)(7)(A).
3. Appellant's Brief in this matter was prepared using WordPerfect for

Windows 6.1, with a 14-pt, proportionally-spaced Times New Roman font face, in compliance with Fed. R. App. P. 32 (a)(5).

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