



## SUMMARY OF THE CASE

DEFENDANT was indicted in the Southern District of Iowa on a single charge of illegal reentry following deportation upon commission of an aggravated felony. He pled guilty to the offense as charged and was granted a three-level reduction for timely acceptance of responsibility. He sought, but was denied, a downward departure based upon his cultural assimilation. He appeals, asserting the district court erred in denying the departure without considering defendant's cultural and familial motives for illegally returning to the United States.

After a review of all court papers and transcripts, counsel respectfully submits this brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing that the district court erred in denying the defendant a downward departure based upon cultural assimilation.

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## **PRELIMINARY STATEMENT**

The decision appealed: Defendant Jorge Pesina-Cardenas appeals from judgment of conviction and sentence entered against him by the Honorable Charles R. Wolle, in the Southern District of Iowa, following guilty plea to a charge of illegal reentry following deportation.

Jurisdiction of the court below: The United States District Court had jurisdiction over appellant's federal criminal prosecution pursuant to 18 U.S.C. § 3231: "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

Jurisdiction of this court: This court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291: "The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

The defendant filed a timely Notice of Appeal on July 19, 2001, from final judgment entered July 16, 2001.

**STATEMENT OF THE ISSUE  
PRESENTED FOR REVIEW**

- I. WHETHER THE DISTRICT COURT ERRED IN DENYING DEFENDANT’S REQUEST FOR A DOWNWARD DEPARTURE BASED UPON CULTURAL ASSIMILATION.

Authorities

*United States v. Lipman*, 133 F.3d 726 (9<sup>th</sup> Cir. 1998)

**STATEMENT OF THE CASE**

Nature of the Case: This is a direct appeal by defendant Jorge Pesina-Cardenas, following guilty plea, judgment, and sentence on a charge of illegal reentry following deportation upon commission of an aggravated felony.

Procedural History: On September 27, 2000, defendant was indicted in the Southern District of Iowa on a single charge of illegal reentry following deportation upon commission of an aggravated felony, in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2). There were no substantive pretrial disputes or motions, and the parties agreed to resolve the charge by guilty plea.

On March 22, 2001, defendant appeared in open court, with counsel, and pled guilty to illegal reentry as charged. (Plea Tr. pgs. 7-8). In return for the plea the government agreed to recommend the maximum three-level reduction in offense level for defendant’s acceptance of responsibility. (Plea Tr. pg. 3).

After granting full reduction for acceptance of responsibility the presentence report placed defendant at base offense level 21. (PSR pg. 5). Defendant's objections to the report were resolved in his favor, with the exception of his request for a downward departure based upon defendant's cultural assimilation. (Obj. ltr., 6/7/01; Sent. Tr. pgs. 15, 18). At sentencing the district court denied a cultural assimilation departure, saying, "I do not think the facts in this case fit the narrow categories of departure based on problems a defendant would face in returning to his home of citizenship." (Sent. Tr. pg. 15). Defendant was thereafter adjudged guilty and sentenced to 77 months imprisonment<sup>1</sup> and three years of supervised release, with the term of incarceration to run concurrently with a state court sentence imposed in Marshal County, Iowa (Judgement, 7/16/01).

Notice of appeal was timely filed July 19, 2001.

## **STATEMENT OF FACTS**

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<sup>1</sup> Defendant was sentenced at base offense level 21, with a guidelines range of 77-96 months.

Defendant first entered the United States in 1976, as an immigrant. (PSR ¶7). He was convicted on a felony drug charge in 1996 and sentenced to five years imprisonment. (PSR ¶7). Defendant was then deported to Mexico in September 1999. (PSR ¶7).

At the plea proceeding defendant admitted his illegal reentry to the United States following his 1999 deportation:

The court: Is it true that on September 20 of last year, in Marshall County, Iowa, that you were arrested and at that time in Marshall County, Iowa?

Defendant: Yes.

The court: And at that time, were you a person who had previously been arrested and deported outside the United States to Mexico on at least one previous occasion?

Defendant: Yeah.

The court: Did you ever after you were deported, receive permission of the United States to return to the United States?

Defendant: No.

The court: Did you know, on September 20, 2000, that you unlawfully were in the United States, that you had no right to be here?

Defendant: Yes.

The court:           And you were here of your own free will, rather than someone forcing you to come to the United States?

Defendant:           Yes.

(Plea Tr. pgs. 7-8).

## **SUMMARY OF THE ARGUMENT**

Defendant sought a downward departure based upon his “cultural assimilation.” The principal basis for the motion was the defendant’s cultural and familial motives for illegally returning to the United States. Defendant respectfully submits the district court erred in denying the departure without giving due consideration to these motives.

## **ARGUMENT**

This brief is filed pursuant to the direction of *Anders v. California*, 386 U.S. 738 (1967). Counsel directs the court to “anything in the record that arguably supports the appeal.” *Id.* at 744.

### **I. THE DISTRICT COURT ERRED IN NOT GRANTING A DOWNWARD DEPARTURE BASED UPON DEFENDANT’S CULTURAL ASSIMILATION.**

In *Koon v. United States*, 518 U.S. 81 (1996), the Supreme Court reaffirmed and strengthened the authority of district court judges to exercise discretion in sentencing, stating:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as an unique study in the human failings that sometime mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge. Discretion is reserved within the Sentencing Guidelines. . . .

*Koon*, 518 U.S. at 113.

Thus, under 18 U.S.C. § 3553(b), a sentencing court may impose a sentence outside the applicable guideline range if the court finds “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 different from that described.” U.S.S.G. § 5K2.0. The sentencing court should treat each guideline as carving out a “heartland” of typical cases setting forth the conduct that each guideline describes. U.S.S.G. Chapter 1, pt. A (4)(b). When a court finds an atypical case to which a particular guideline applies but where the circumstances are significantly different from the normal cases which fall under that guideline, the court may consider whether a departure from the guideline sentence is warranted. *Id.*

In the case at bar defendant sought a sentencing departure based upon his cultural assimilation to the United States. (Sent. Tr. pgs. 9-13). In *United States v. Lipman*, 133 F.3d 726 (9<sup>th</sup> Cir. 1998), the Ninth Circuit recognized cultural assimilation as a valid basis for departure:

Cultural assimilation may be relevant to sentencing under United States Sentencing Guideline § 2L1.2 if a district court finds that a defendant's unusual cultural ties to the United States - - rather than ordinary economic incentives - - provided the motivation for the defendant's illegal reentry or continued presence in the United States. Cultural assimilation may also be relevant to the character of a defendant's sentence under U.S.S.G. § 2L1.2 insofar as his culpability might be lessened if his motives were familial or cultural rather than economic.

*Lipman*, 133 F.3d at 731.

The district court in defendant's case rejected a cultural assimilation departure on the ground that defendant "has not shown that he is unable to live in Mexico, only that he wishes he weren't having to live in Mexico." (Sent. Tr. pg. 15). Defendant respectfully submits the district court erred in considering only the consequences of defendant's future return to life in Mexico, without weighing also the defendant's motives in returning to the United States.

A district court's decision not to depart from the guidelines is unreviewable on appeal, "unless the district court determined it lacked authority to consider a

particular mitigating factor.” *United States v. Correa*, 167 F.3d 414, 417 (8<sup>th</sup> Cir. 1999).

The problem in the case at bar is that the district court wrongly limited its consideration of defendant’s cultural assimilation by failing to recognize or weigh defendant’s motives in returning to the United States. This omission by the court was the functional equivalent of a failure to recognize a departure authority.

The principal mitigation in a cultural assimilation case is the defendant’s cultural or non-economic motivation for returning to the United States. See *Lipman*, 133 F.3d at 731. When the district court here failed to weigh defendant’s motivation for his return to the United States, it effectively closed off the legal grounds for departure.

Defendant and counsel argued for leniency based upon defendant’s familial and cultural motives for returning to the United States. (Sent. Tr. pgs. 9-11). Because such motives are at the heart of the cultural assimilation determination, it was error for the district court not to weigh these motives in ruling on defendant’s departure request.

## **CONCLUSION**

For all the above reasons defendant-appellant respectfully requests that his sentence be reversed and the case remanded for further proceedings on defendant's request for departure.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that I mailed two copies of this brief and a 3½-inch computer diskette containing the full document to Edwin Kelly, United States Attorney's Office, U.S. Courthouse Annex, Suite 286, 110 East Court Avenue Des Moines, Iowa 50309-2053, on the 17th day of September, 2001. The diskette has been scanned for viruses using Norton Anti Virus Version 5.0, and that scan showed the diskette is virus-free.

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## CERTIFICATE OF FILING

I certify that I filed ten copies of this brief and a 3½-inch computer diskette containing the full document to the U.S. Court of Appeals for the Eighth Circuit Clerk's Office, Thomas F. Eagleton Courthouse, Room 24.329, 111 S. 10th Street St. Louis, MO 63102 by sending it via Federal Express on the 17th day of September, 2001. The diskette has been scanned for viruses using Norton Anti Virus Version 5.0, and that scan showed the diskette is virus-free.

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