

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term, 2003

5
6 (Argued: November 7, 2003

Decided: November 17, 2003)

7
8 Docket No. 02-1630
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12 UNITED STATES OF AMERICA,

13 *Appellee,*

14 v.

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17 JUAN ANTONIO REINOSO,

18 *Defendant-Appellant.*
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25 Before: CARDAMONE, SOTOMAYOR, and KATZMANN, *Circuit Judges.*

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28 Defendant-appellant Juan Antonio Reinoso appeals from a judgment of the United
29 States District Court for the Southern District of New York (Schwartz, J.), entered October 15,
30 2002, sentencing him to, *inter alia*, 77 months' imprisonment for illegal reentry, in violation of 8
31 U.S.C. §§ 1326(a) and (b)(2). The sentence was based in part on a 16-level enhancement to the
32 base offense level mandated by United States Sentencing Guidelines § 2L1.2, because Reinoso
33 had previously been convicted of a violent felony. We hold that: (1) the district court was
34 correct to apply the 16-level enhancement, even though Reinoso's violent felony conviction had
35 been vacated by a youthful offender adjudication; (2) the district court correctly applied the
36 Guidelines Manual in effect at the time of sentencing; and (3) the district court did not

1 misapprehend its authority to depart downward on the basis of extreme childhood abuse.

2 AFFIRMED.

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4 VALERIE AMSTERDAM, Amsterdam & Branden, New York,
5 NY, *for defendant-appellant*.

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7 MICHAEL M. PURPURA, Assistant United States Attorney for
8 the Southern District of New York (James B. Comey, United States
9 Attorney for the Southern District of New York, on the brief; Gary
10 Stein, Assistant United States Attorney, of counsel), New York,
11 NY, *for appellee*.

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15 SOTOMAYOR, *Circuit Judge*:

16 Juan Antonio Reinoso (“Reinoso” or “defendant”) appeals from a judgment
17 entered on October 15, 2002, in the United States District Court for the Southern District of New
18 York (Schwartz, J.), following a guilty plea. Reinoso, a citizen of the Dominican Republic, pled
19 guilty to illegally reentering the United States after having been deported subsequent to his 1995
20 conviction for the commission of an aggravated felony, in violation of 8 U.S.C. §§ 1326(a) and
21 (b)(2). The district court sentenced Reinoso to a term of 77 months’ imprisonment, to be
22 followed by a two-year term of supervised release. Pursuant to United States Sentencing
23 Guidelines (“U.S.S.G.”) § 2L1.2,¹ which governs the offense level for illegal reentry, the district
24 court found that Reinoso’s conviction for second-degree armed robbery constituted a conviction
25 for a “crime of violence” that mandated a 16-level enhancement to the base offense level, even
26 though the conviction had later been vacated by a youthful offender adjudication. The court also
27 denied a downward departure based on diminished capacity, finding that Reinoso’s mental and

¹ Unless otherwise noted, all references to the Sentencing Guidelines are to the 2001 version applied by the district court.

1 emotional problems, caused by severe childhood abuse, had not contributed to his commission of
2 the offense. We hold that the district court was correct to apply the 16-level enhancement, and
3 that it did not misapprehend its authority to grant a downward departure based on extreme
4 childhood abuse. We also reject defendant’s argument, raised for the first time in his reply brief,
5 that the district court should have applied the version of the Guidelines that was in effect at the
6 time of the offense.

8 **BACKGROUND**

9 Reinoso initially moved to the United States from the Dominican Republic in
10 1984, at the age of 16. He then accumulated a substantial criminal record, beginning in 1985,
11 when he was tried and convicted as an adult in the New York County Supreme Court for second-
12 degree armed robbery. Because he was only 17 at the time of his conviction, he was later
13 adjudicated a “youthful offender” under New York law, and his conviction was vacated. Reinoso
14 proceeded to commit multiple narcotics and firearms offenses and attempted burglary of a motor
15 vehicle, and was deported to the Dominican Republic in November 1998. He returned to the
16 United States illegally in 1999 or 2000, and was arrested on April 19, 2000. Charged with
17 illegally reentering the United States subsequent to a conviction for an aggravated felony, in
18 violation of 8 U.S.C. §§ 1326(a) and (b)(2), Reinoso pled guilty in August 2001.

19 At Reinoso’s sentencing hearing in October 2002, the government argued that,
20 pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii), Reinoso should receive a 16-level enhancement to the
21 base offense level provided for illegal reentry in U.S.S.G. § 2L1.2(a), because he had been
22 convicted of second-degree armed robbery, a felony crime of violence, prior to his illegal reentry.

1 Reinoso did not contest that the armed robbery conviction would constitute a crime of violence
2 within the meaning of § 2L1.2(b)(1)(A)(ii), but contended that because the conviction had later
3 been vacated by the New York Supreme Court’s finding that he was a youthful offender, the
4 court could not consider it in determining his offense level. He further argued that he was
5 entitled to a downward departure for diminished capacity because, as a result of the severe abuse
6 that he suffered as a child, he was “psychologically constrained to return to the United States.”
7 The district court found that Reinoso’s armed robbery conviction warranted the 16-level
8 enhancement, resulting in a total offense level of 24, and denied the downward departure on the
9 ground that there was no causal connection between Reinoso’s mental state and his offense. The
10 court therefore imposed a sentence of 77 months’ imprisonment.

12 DISCUSSION

13 On appeal, Reinoso raises a number of challenges to his sentence. He first argues
14 that the district court should not have taken into account his armed robbery conviction in
15 increasing his offense level by 16 points pursuant to U.S.S.G. § 2L1.2, because that conviction
16 was later vacated by a youthful offender adjudication. He then contends that the district court
17 committed plain error and violated the *ex post facto* clause of the Constitution by sentencing him
18 pursuant to the 2001 version of the Guidelines, in effect at the time of his October 2002
19 sentencing, rather than the 1998 version, which was in effect when he committed the offense
20 around April 2000. Finally, Reinoso claims that the court misapprehended its authority to grant
21 him a downward departure based on extraordinary childhood abuse. All of these contentions are
22 without merit.

1 **I. Reinoso’s Offense Level Under Section 2L1.2**

2 Reinoso argues that, because his armed robbery conviction had later been vacated
3 by his youthful offender adjudication, the district court erred in applying a 16-level enhancement
4 to his base offense level pursuant to U.S.S.G. § 2L1.2. Section 2L1.2(b)(1)(A)(ii) provides that
5 “[i]f the defendant previously was deported . . . after — (A) a conviction for a felony that is . . .
6 (ii) a crime of violence,” the base offense level of 8 should be increased by 16 levels. Because
7 armed robbery is included in the definition of a “crime of violence,” U.S.S.G. § 2L1.2, cmt.
8 n.1(B)(ii)(II), the district court found that Reinoso’s armed robbery conviction mandated the 16-
9 level enhancement.

10 Reinoso contends, however, that his youthful offender adjudication precludes a
11 finding that his armed robbery offense resulted in a “conviction” within the meaning of
12 § 2L1.2(b)(1)(A). New York law provides that an “eligible youth” between the ages of 16 and 19
13 who is tried as an adult may, subsequent to his or her conviction, be adjudicated a youthful
14 offender, resulting in the vacating of the judgment of conviction. N.Y. Crim. Proc. L.
15 § 720.20(1)-(3) (McKinney’s 2000). Because a youthful offender adjudication is “not a
16 judgment of conviction for a crime,” *id.* § 720.35(1), Reinoso argues that it may not be
17 considered in calculating his offense level pursuant to U.S.S.G. § 2L1.2.

18 This argument is foreclosed by our holding in *United States v. Driskell*, 277 F.3d
19 150 (2d Cir. 2002), that a youthful offender adjudication remains a conviction in substance,
20 regardless of its characterization under New York law. In considering whether a conviction later
21 vacated by a youthful offender adjudication could be used to calculate a defendant’s criminal
22 history pursuant to U.S.S.G. § 4A1.1 and 4A1.2(d), we examined New York’s treatment of

1 youthful and juvenile offenders, and concluded that a youthful offender adjudication is intended
2 not to absolve youthful offenders of criminal responsibility, but rather, to punish them for their
3 crimes while aiding in their post-conviction rehabilitation. *Id.* at 155; *see also United States v.*
4 *Matthews*, 205 F.3d 544, 548-49 (2d Cir. 2000) (holding that an adjudication under New York’s
5 youthful offender statute does not operate as an “expungement” of the defendant’s conviction,
6 and the conviction may be considered in calculating criminal history). Because an eligible youth
7 is not deemed a youthful offender until *after* he has been convicted as an adult, and “the court
8 has, in its discretion, determined that the interest of justice would be served by relieving the
9 eligible youth from the onus of a criminal record,” we concluded that a youthful offender
10 adjudication does not alter the substance of the defendant’s adult conviction. *Driskell*, 277 F.3d
11 at 155 (internal quotation marks omitted).

12 *Driskell’s* reasoning applies here. Section 2L1.2 requires only that the defendant
13 have a “conviction” for a crime of violence in order to warrant the 16-level enhancement, as
14 Reinoso does. His subsequent youthful offender adjudication did not expunge his conviction, or
15 otherwise absolve him of criminal responsibility for the armed robbery. The district court was
16 therefore correct in using the conviction to calculate Reinoso’s offense level.

17 Reinoso argues, however, that *Driskell* should not apply because New York’s
18 characterization of his conviction should control the analysis under § 2L1.2. He relies on *United*
19 *States v. Davis*, No. 02 Cr. 6118T, 2003 WL 252143, at *1-*2 (W.D.N.Y. Jan. 29, 2003), in
20 which the district court refused to apply *Driskell’s* emphasis on the substance of a youthful
21 offender adjudication in calculating the defendant’s offense level under § 2K2.1, the Guidelines
22 provision that applies to possession of a firearm after a felony conviction. Reinoso’s reliance on

1 *Davis* is unavailing, however. Section 2K2.1, the Guidelines provision at issue in *Davis*,
2 specifically defines an “adult conviction” as one that is “classified as an adult conviction under
3 the laws of the jurisdiction in which the defendant was convicted.” U.S.S.G. 2K2.1 cmt. n.5.
4 Section 2L1.2, in contrast, does not define the term “conviction” or provide any limitations on
5 the types of adjudications that could constitute convictions, nor does it limit the definition of
6 “conviction” by reference to its state law characterization as an “adult conviction.” *See* U.S.S.G.
7 § 2L1.2 cmt. n.1(B)(ii). Similarly, the Guidelines provision at issue in *Driskell*, § 4A1.1, also did
8 not incorporate the state law characterization of the conviction into its definition of “conviction.”
9 Thus, a comparison of § 2L1.2 and § 4A1.1 with § 2K2.1 establishes that, when the drafters of
10 Guidelines intend to render the sentencing court’s analysis dependent on the state’s treatment of
11 the conviction, they explicitly reference the state law characterization in the text of the provision.
12 *See, e.g., id.* § 2K1.3, cmt. n.2 (defining “felony conviction” as “a prior adult federal or state
13 conviction . . . classified as an adult conviction under the laws of the jurisdiction”); *id.* § 4B1.2,
14 cmt. n.1 (same). Section 2L1.2’s failure to mandate that the sentencing court accord a
15 defendant’s conviction the status that New York law ascribes to it indicates Congress’s intent not
16 to so limit the definition of “conviction.”

17 Reinoso next argues that *Driskell* should not control his sentencing because the
18 Guidelines section at issue in *Driskell* determined the defendant’s criminal history category,
19 rather than his base offense level. There is no principled reason to distinguish between
20 convictions that are considered for the purpose of calculating a defendant’s criminal history
21 category, and those used to calculate the base offense level. We suggested as much in *Driskell*,
22 as we cited with approval two cases from other circuits that treated youthful offender

1 adjudications as convictions for the purpose of determining offense level enhancements based on
2 the defendants' status as career offenders. *See Driskell*, 277 F.3d at 157 (citing *United States v.*
3 *Pinion*, 4 F.3d 941 (11th Cir. 1993), and *United States v. Carillo*, 991 F.2d 590 (9th Cir. 1993)).
4 Moreover, the ultimate purpose of both the offense level enhancement at issue here and the
5 criminal history calculation at issue in *Driskell* is to take into account the substance of a
6 defendant's prior criminal conduct, because in both cases the drafters of the Guidelines have
7 determined that it is relevant to the severity of the sentence to be imposed. Just as the criminal
8 history calculation reflects that a "defendant with a record of prior criminal behavior is more
9 culpable than a first offender and thus deserving of greater punishment" for the same offense,
10 U.S.S.G. pt. 4 intro. cmt., the offense of illegal reentry is rendered more serious when committed
11 by a defendant with a history of violent crime, and therefore merits a more severe sentence, *see*
12 *id.* § 2L1.2(b). Accordingly, there is no basis for distinguishing between the criminal history
13 calculation and the base offense level calculation in applying *Driskell's* conception of youthful
14 offender status.

15 Reinoso also contends that, in the alternative, § 2L1.2 is ambiguous as to whether
16 his youthful offender adjudication should be treated as a conviction for a crime of violence,
17 because "the Sentencing Commission . . . did not choose to specifically articulate that [youthful
18 offender] adjudications . . . constitute predicate felonies for purposes of base offense level
19 enhancements," and therefore the rule of lenity should apply. Although "where there is
20 ambiguity in a criminal statute, doubts are resolved in favor of the defendant," *United States v.*
21 *Bass*, 404 U.S. 336, 348 (1971), "in order for the rule of lenity to apply to a criminal law – or in
22 this case, to a Guideline – the provision of law at issue must be ambiguous." *United States v.*

1 *Simpson*, 319 F.3d 81, 87 (2d Cir. 2002). The fact that § 2L1.2 does not explicitly provide for
2 the consideration of youthful offender adjudications does not render the provision ambiguous.
3 As discussed above, the plain language of § 2L1.2, considered in tandem with other provisions,
4 as well as the controlling case law, clearly establishes that the provision does not limit the term
5 “conviction” to those judgments that would be considered convictions under state law.
6

7 **II. The District Court’s Use of the 2001 Version of the Guidelines**

8 Reinoso argues for the first time in his reply brief that the district court, in
9 calculating his sentence, should not have used the 2001 version of the Guidelines, in effect at the
10 time of his sentencing, but rather, should have used the 1998 version in effect at the time of his
11 offense. Reinoso contends that the 2001 Guidelines had been amended to mandate higher
12 penalties for the offense of illegal reentry than were in place under the 1998 version in effect in
13 2000, when he committed the offense. We will consider this argument because it could
14 otherwise be raised in a collateral attack, and because it is entirely without merit. *See United*
15 *States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) (considering argument that was not
16 properly presented to the court on appeal in order to obviate the possibility of a collateral attack
17 on the conviction). Section 1B1.11(a) of the Guidelines provides that “[t]he court shall use the
18 Guidelines Manual in effect on the date that the defendant is sentenced,” but that “[i]f the court
19 determines that the use of the Guidelines Manual in effect on the date that the defendant is
20 sentenced would violate the *ex post facto* clause of the . . . Constitution,” the court must apply the
21 version of the Guidelines in effect when the offense was committed, *id.* § 1B1.11(b)(1).

22 Because Reinoso was sentenced in October 2002, the district court applied the

1 2001 version of § 2L1.2, which provides for a base offense level of 8, and the 16-level
2 enhancement that Reinoso received because his armed robbery conviction counted as a previous
3 conviction for a crime of violence. *Id.* § 2L1.2(b)(1)(A) (2001). The 2001 version of § 2L1.2
4 reflected recent amendments, however, that altered the way in which the offense level increases
5 in accordance with prior convictions. The 1998 version of § 2L1.2, which was in effect at the
6 time that Reinoso illegally reentered the country, provides that the base offense level is 8, and
7 that the offense level should be increased by the greater of 16 levels for a prior conviction of an
8 aggravated felony, or 4 levels for a prior conviction of any other felony. *Id.* § 2L1.2(b)(1) (1998).
9 Reinoso contends that the armed robbery conviction would have mandated only the 4-level
10 enhancement, and therefore the 2001 Guidelines exposed him to a higher potential sentence than
11 the version in effect when he committed the offense, requiring the district court to apply the 1998
12 Guidelines to calculate his sentence.

13 Because Reinoso failed to object to the district court’s use of the 2001 Guidelines
14 at his sentencing, we review only for plain error, *United States v. Sofsky*, 287 F.3d 122, 125 (2d
15 Cir. 2002), and find Reinoso’s argument to be without merit. The foundation of his contention is
16 that he would have received a lesser sentence under the 1998 Guidelines because his armed
17 robbery conviction would have resulted in an offense level enhancement of only 4 levels,
18 resulting in a total offense level of 12, rather than the level of 24 reached under the 2001
19 Guidelines. Reinoso ignores the fact that he has multiple convictions, however, and if any one of
20 them would qualify as an “aggravated felony” conviction under § 2L1.2(b)(1)(A) (1998), he
21 would have received a 16-level enhancement even under the 1998 Guidelines. Application note
22 1 defines an “aggravated felony” as one of the offenses enumerated by 8 U.S.C. § 1101(a)(43),

1 which includes a “theft offense . . . or burglary offense for which the term of imprisonment is at
2 least one year.” 8 U.S.C. § 1101(a)(43)(G). In 1989, Reinoso was convicted in New Jersey of
3 attempted burglary of a motor vehicle, for which he received a sentence of four years’
4 imprisonment. Because this aggravated felony conviction would have warranted a 16-level
5 enhancement, which in turn would have placed Reinoso’s sentence in the range of 77-96 months,
6 *see* U.S.S.G. Ch. 5 pt. A (1998), Reinoso would have faced the same sentencing range under the
7 1998 Guidelines as he did under the 2001 Guidelines. The district court’s use of the 2001
8 Guidelines therefore does not implicate the *ex post facto* clause or § 1B1.11, and the court
9 correctly applied the version of the Guidelines in effect at the time of sentencing.

11 **III. Downward Departure for Extreme Childhood Abuse**

12 Finally, we consider Reinoso’s claim that the district court misapprehended its
13 authority to grant him a downward departure based on “extreme childhood abuse.” *United States*
14 *v. Rivera*, 192 F.3d 81, 85 (2d Cir. 1999). “[A] district court’s decision not to depart from the
15 applicable Guidelines range normally is not appealable,” *United States v. Garcia*, 166 F.3d 519,
16 521 (2d Cir. 1999), except in the rare cases in which the district court has imposed an illegal
17 sentence or mistakenly believed that it lacked the authority to depart, *United States v. Lainez-*
18 *Leiva*, 129 F.3d 89, 93 (2d Cir. 1997). Reinoso’s argument is essentially that the district court
19 misunderstood its authority to depart because it failed to realize that Reinoso’s childhood abuse
20 was so severe that it automatically warranted a departure, regardless of whether it contributed to
21 his illegal reentry into the United States. This contention is without merit.

22 At the sentencing proceeding, Reinoso requested a departure based on diminished

1 capacity, but not on childhood abuse, and the district court found that Reinoso’s reduced mental
2 capacity did not contribute to the commission of the offense, and therefore no diminished
3 capacity departure was warranted. This determination precludes a childhood abuse departure as
4 well, because a finding “that extreme childhood abuse caused mental and emotional conditions
5 that *contributed to* the defendant’s commission of the offense” is a factual prerequisite for the
6 departure. *Rivera*, 192 F.3d at 85 (emphasis added). Although the court did not explicitly
7 consider the childhood abuse departure ground (presumably because defendant never argued it),
8 it had already found, in essence, that “the facts of the case at hand [did] not provide any basis for
9 lawful departure.” *United States v. Brown*, 98 F.3d 690, 693 (2d Cir. 1996). Given the court’s
10 clear factual finding with respect to the diminished capacity ground, the judge’s silence on the
11 childhood abuse departure ground is best viewed as reflecting the understanding that a departure
12 on that basis had already been precluded. It certainly does not provide “clear evidence of a
13 substantial risk” that the judge misapprehended his authority to depart. *Id.* at 694; *United States*
14 *v. Lawal*, 17 F.3d 560, 563 (2d Cir. 1994) (“[A] district court’s silence concerning its refusal to
15 depart downward does not support an inference that the district court misapprehended its scope
16 of authority.”).

17 To the extent that Reinoso is arguing that the abuse he suffered was so severe that
18 it automatically warrants a downward departure, regardless of the existence of a causal
19 connection between the abuse and the offense conduct, his contention is precluded by our case
20 law. *Rivera* explicitly limits the situations in which a departure based on abuse is warranted to
21 those in which the abuse creates to a mental condition that in turn leads to or causes the criminal
22 conduct. *Rivera*, 192 F.3d at 85.

1

CONCLUSION

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For the foregoing reasons, the judgment of the district court is AFFIRMED.