

In The
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 00-3415MNST

Criminal

UNITED STATES OF AMERICA,

APPELLEE,

v.

PEDRO SERA,

APPELLANT.

Appeal from the United States District Court for the

District of Minnesota

BRIEF OF APPELLEE

ROBERT M. SMALL
United States Attorney

BY: DAVID P. STEINKAMP
Assistant U.S. Attorney
Attorney ID Number 178470
District of Minnesota
600 United States Courthouse
300 South Fourth Street

POSITION CONCERNING ORAL ARGUMENT

The United States respectfully requests that this matter be considered without oral argument.

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SUMMARY OF THE CASE

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United States Sentencing Guidelines, Section 5H1.10 13

STATEMENT OF THE CASE

Pursuant to a plea agreement, Sera, a Mexican national,

than he would have otherwise received. Because of this, the district court's denial of Sera's § 2255 motion should be affirmed.

STATEMENT OF THE FACTS

On

The

resulting

applicable guideline range was 70 to 87 months, the judge

ARGUMENT

- I. SERA'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT MOVING FOR
DOWNWARD2) Tw (ED 3but for counseled Os unprofessionals TO I.

methamphetamine in a determination of relevant conduct,
reducing his sentence from 120 months to 70 months, the low
end of the guideline range of 70-87 months. Although Sera's
counsel's recommendation of 70 months is at the low end of the guideline range, the court is inclined to follow the court's recommendation of 70 months.

persuasive. The Court lacks information regarding the factors that went into the court's decision in Guzman-Villacana. The strength of the evidence, the sentencing issues, the defendant's relevant conduct, his criminal history and other facts are unknown. This prior case cited by Sera should not

range had the court granted a downward departure motion. Sera cannot show conclusively that the result of the sentencing would have been any different.

For these reasons, Sera cannot establish ineffective assistance of counsel for failure to make a departure motion based upon his willingness to waive resistance to deportation, nor can he establish that the result of his sentence would have been different had the motion been made. The court's order denying appellant's § 2255 motion should be affirmed.

II. SERA'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO
MOVE FOR DOWNWARD DEPARTURE BASED ON THE CLAIMED INCREASE

downward departure would not have been the wise strategic course to take in an effort to lessen his client's sentence. He made a strategy decision to argue that his client's

court has broad discretion in granting or denying a motion for downward departure and the sentence is generally unreviewable. See, United States v. Fairchild, 189 F.3d 769, 780-81 (8th Cir. 1999). Any claim that the appellant's sentence would have been 780-h3 ut hd h is attorney made the motion isate bst,

CONCLUSION

Sera cannot establish ineffective assistance of counsel

ADDENDUM OF APPELLEE

Winston Morrison v. United States of America