

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 01-2166

UNITED STATES OF AMERICA,

Appellee,

Vs.

ZENAIDO VASQUEZ,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

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ATTORNEY FOR APPELLANT

SUMMARY OF THE CASE

The case is an appeal to the United States Court of Appeals for the Eighth Circuit from a Judgment and Sentence entered on May 2, 2001, by the United States District Court for the Southern District of Iowa. Zenaido Vasquez pled guilty to one count of illegal reentry after deportation for a felony in violation of 8 U.S.C. § 1326 (a)

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STATEMENT OF THE CASE

NATURE OF THE CASE:

This case is an appeal to the United States Court of Appeals for the Eighth Circuit from a Judgment and Sentence entered on May 2, 2001 by the United States District

Investigation

departure for failure to consider defendant's alienage during sentencing.

Mr. Vasquez does not disagree with the presentence investigation report, except that he should get an additional one level downward departure for circumstances not contemplated by the Sentencing Guidelines. The district court denied Defendant's request for a one level downward departure as a matter of law, even though at least one Federal Circuit Court has held that the district court has legal discretion to depart downward because of the defendant's status as a deportable alien. See, e.g., United States v. Charry-Cubillos, 91 F.3d 1342 (9th Cir. 1996).

The defendant's situation was not adequately considered under the Sentencing Guidelines. Mr. Vasquez has an INS detainer as a deportable alien. He will be deported from the United States following his period of incarceration. As a result, Mr. Vasquez will be unable to participate in various Bureau of Prisons (BOP) programs. BOP programs include drug treatment programs, supervised release, or release to a halfway

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the departure as a matter of law. Furthermore, his opportunity to benefit from the Bureau programs is extinguished because of his alien status. This causes disparate treatment against defendants such as Mr. Vasquez because of their alien status.

Mr. Vasquez will be unable to be near his wife in Iowa as a result of the INS detainer and the inability to participate in the Bureau programs. This is a situation not contemplated under the sentencing guidelines. Mr. Vasquez cannot take advantage of the drug treatment programs, or partake in supervised release. This inability therefore denies him both the opportunity for drug treatment and for a one year reduction in his sentence.

In addition, the Bureau places deportees at specific holding facilities, continuing to restrict the defendant of his ability to be near his family. This is a substantial increase in the severity of the defendant's sentence as a result.

One

halfway house, or home confinement. They did not include the drug treatment program.

e Sentencing Guidelines, do not expressly

to administrative deportation. Other circuits have addressed the situation more directly. In United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997), the Seventh Circuit held that

setting the guideline level for any crime.

Alien status as an element of a crime and the adverse affects *caused* by that alien status while actually in prison are two completely detached issues. That alien status is an element of a crime shows only that the Sentencing Guidelines Commission considered alienage when deciding on a reasonable starting point for punishment. It is not evident in logic, and there is no evidence in the Guidelines Commentary, that the Commission knew of or took any consideration of the treatment received after sentencing by the Bureau of Prisons. The Bureau of Prisons is an entirely different agency, in control at a different stage in the process. There is no evidence that the Sentencing Commission considered the kind of harshness that ensues once the power shifts from sentencing in the judicial system to actual application of punishment in the Bureau of Prisons.

The conspicuous absence of any discussion regarding disparate BOP treatment is further evidence that the issue was not fully considered by the Commission, when viewed in light of the statutory scheme. The very fact that section 3553(b) exists, is evidence that the Sentencing Commission recognized that there were certain aspects of

to be considered by the sentencing judge in the search for justice and equity. The Commission was on notice that any issue not clearly evidenced as fully considered would be argued by numerous attorneys for consideration by the sentencing judge. Any factor the Commission viewed as important would be evidenced somewhere on the record. The failure of the Commission to mention the BOP treatment is evidence

quasi-legislative body in this most important realm.

The district court should have considered these substantial burdens not adequately considered in the guidelines and granted a downward departure.

CONCLUSION

Defendant Zenaido Vasquez was sentenced to 46 months in the Bureau of

departure.

CERTIFICATE OF SERVICE

I certify that I mailed two copies of this brief and a 3 ½ inch computer diskette containing the full document to Ed Kelly, Attorney for Appellee, United States Attorney's

CERTIFICATE OF COMPLIANCE

I, James A. Benzoni, attorney for Appellant, certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32 (a)(7)(B). The brief uses a proportionally spaced face, 14 point Times New Roman font.

James A. Benzoni

COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellant's Brief and Addendum was the sum of \$_____.

James A. Benzoni