

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

No. 01-2166 SIDM

CRIMINAL

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

ZENAIDO VASQUEZ-Resendiz,

Defendant/Appellant.

Appeal from the United States District Court for the
Southern District of Iowa
Honorable Robert Pratt, Judge

BRIEF OF APPELLEE

Inga Bumbary-Langston
United States Attorney

Ed Kelly
Assistant U.S. Attorney

Fax: (515) 284-6281

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Defendant appeals from a sentence for being an aggravated felon illegally present in the United States following earlier deportation. He was convicted upon his plea of guilty and appeals from the District Court's refusal to accept his motion to depart downwards from the prescribed guidelines range at sentencing. His allegation claims that as a matter of law, this court should reconsider Eighth Circuit precedent, that prohibits departure on his claim that the defendant will receive disparate treatment at the hands of the Bureau of Prisons during incarceration because he stands convicted as an illegal alien. This ground was

TABLE OF CONTENTS

SUMMARY AND REQUEST FOR ORAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT v

STATEMENT OF THE ISSUES vi

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

SUMMARY OF THE4935 Tc.

STATEMENT OF FACTST OF FACTS

TABLE OF AUTHORITIES

Cases

Koon v. United States, 518 U.S. 81 (1996) 7-8, 10

United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir.2000) 10

United States v. Cardoza-Rodriguez,

241 F.3d 613 (8th Cir. 2008), cert. denied, 129 S.Ct. 1157 (2009);
Koon v. United States, 518 U.S. 81 (1996)

Statutes, Guidelines, Rules & Other Authority

Title 8 USC § 1252(a)(2)(A) 9

STATEMENT OF THE ISSUES

I.

**MAY A DISTRICT COURT DENY, ON LEGAL GROUNDS, A
DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE
ON CLAIMS HIS STATUS AS A DEPORTABLE ALIEN WILL**

The court rejected the departure request as a matter of law, based upon the reported holding in *Cardoza-Rodriguez*, 241 F.3d at 614.

Defendant was then sentenced under the aggravated felon provisions of 79et edoe (b) (2) d

Defendant challenge as th issque surro unding the istricte cour'se dnials od

SUMMARY OF THE ARGUMENT

Sentencing court/FOytong nfinOythemselvesytonthe guidelinOs set forth bythe UnitedNT

ARGUMENT

Standard of Review

I

The issue has been thoroughly examined. It has been decisively settled by this Court adversely to the defendant's cause in *United States v. Cardoza-Rodriguez*, *id.*

Although the defendant argues the *Cardoza-Rodriguez* decision was wrongfully decided, one panel of this court may not overrule an earlier panel's decision. See *United States v. Reynolds*, 116 F.3d 328, 329 (8th Cir.1997). Similarly, just as one panel cannot reverse the holding of another panel of this Court, it is beyond question that a District Court may not unilaterally do so.

Among other courts rejecting deportability as a basis for downward departure is *United States v. Restrepo*, 999 F.2d 640 (2d Cir. 1993) in the Second Circuit. There the court rejected the claim for a departure, which amounted to an indirect challenge to the Bureau of Prisons' policies relating to inmate classification, for three sound reasons.

[1] Even if it were a steadfast policy of the Bureau to deny reassignment to relaxed-security facilities to alien prisoners who must be deported on account of their convictions, we would consider that policy an inappropriate basis for departure from the imprisonment range prescribed by the Guidelines. Assuming that § 3624(c) was intended to appx8a 80iithe 4scrdeported on

release to a halfway house. The Bureau of Prisons policy does not apply merely to deportable alien prisoners, but to all prisoners who have detainers lodged against them.

In the Koon analysis, the first question is supposed to be, "What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special or unusual case?" *Koon v. United States*, 518 U.S. 81, 95 (1996). The answer in this matter is that it is not atypical -- but typical of every other case under this Guideline. See *United States v. Bonnet-Grullon*, 212 F.3d 692 (2d Cir.2000). If departures unrelated to specific mitigating factors and events were to occur, the ruling that such departures are in general permissible, unrelated to particular characteristics of the individual defendant or to any special feature of his case, would have undermined the goal of reducing unwarranted disparities in the sentences of similarly situated defendants. See also, *United States v. Sentamu*, 212 F.3d 127, 138 (2nd Cir. 2000).

As the Defendant's particular mitigating factors cited in this case are squa- buaseio4.76 -28.5 9 0.05
rai is (genetactoauear in thierilaw.w (In th3) Tj 357.7506 TD 0.08924 Tc -0.1ee also, United SC

CONCLUSION

For the foregoing reasons, the United States respectfully requests that District Court's denial of the request for downwards departures be upheld, and that the Defendant's conviction and sentence be affirmed.

United States of America

Chouse Annexrica
515) 284-6410rica

**CERTIFICATE OF COMPLIANCE AND
WORD PROCESSING PROGRAM**

I, the undersigned, hereby certify on the 20

