

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 01-2242NEL

UNITED STATES OF AMERICA,

Appellee,

v.

ANGEL ALBERT RODRIGUEZ,

Appellant.

BRIEF OF APPELLEE

Appeal from the United States District Court
For the District of Nebraska

Honorable Richard G. Kopf, United States District Judge

UNITED STATES OF AMERICA

MICHAEL G. HEAVICAN
United States Attorney
District of Nebraska

and

DAVID W. STEMPSON
Special Assistant U.S. Attorney

oral argument is necessary, the Un2TtStates would respectfully submit, at 10 minutesii

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- I. THE DISTRICT COURT WAS AWARE OF ITS DISCRETION TO DEPART FROM THE GUIDELINES AND DECLINED TO DO SO. THEREFORE, THAT DECISION IS NOT SUBJECT

TABLE OF AUTHORITIES

United States v. Restrepo, 999 F.2d 640 (2d Cir. 1993) 10

STATEMENT OF THE CASE

Angel

(R.p.6, filing 39). The District Court denied this motion in its tentative findings.

(R.p.7, filing 45).

An evidentiary hearing was held on Rodriguez's motion on May 4, 2001 (R.
page

in

to consider a particular mitigating factor.” United States v. Lim, 235 F. 3d 382, (8th Cir 2000).

Even if a decision not to depart is subject to review, such review is for abuse of discretion. United States v. Bahena, 223 F.3d 797, 807 (8th Cir. 2000) and Koon v. United States

Koon

B. ARGUMENT

determine whether a defendant's conduct differs significantly from the heartland of guideline cases by comparing the facts and circumstances of the case with other cases encompassed by the same guideline. "If a factor is unmentioned in the Guidelines, the court



must show something "extraordinary" beyond the consequences of alien status generally contemplated by statutory and regulatory provisions. The Restrepo court stated:

We agree that, to the extent that alienage is a characteristic shared by a large number of persons subject to the Guidelines, it is a characteristic that, for sentencing purposes, is not 'ordinarily relevant.' It remains, however, a characteristic that may be considered if a sentencing court finds that its effect is beyond the ordinary.

Restrepo, 999 F.2d at 644. See United States v. Veloza, 83 F.3d 380, 382 (11th Cir. 1996) (following Restrepo to hold that while extraordinary consequences of alienage might support a departure, factors such as ineligibility for halfway house confinement were insufficient); United States v. Mendoza-Lopez, 7 F.3d 1483, 1487 (10th Cir.

consequences as a result of that status is simply a fact. It need not alter

community

treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

(B) Period of custody.--The period a prisoner convicted of a nonviolent

CONCLUSION

For

CERTIFICATION OF DISKETTE