

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

No. 01-2447

GABINO GARDUNO-BUSTOS
Appellant

v.

UNITED STATES OF AMERICA

0 . 43 - 57 . 15 j T) - j 1 _ _ _ _ _ 1 Ct - b UN No. 01 - 2447 _

SUMMARY OF THE CASE

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JURISDICTIONAL STATEMENT

(i) The Honorable Dean Whipple, United States District Judge for the Western

STATEMENT OF THE ISSUE

I.

WHETHER, PURSUANT TO § 4A1.3, THE DISTRICT COURT ABUSED ITS DISCRETION IN DEPARTING UPWARD FROM THE PRESUMPTIVE SENTENCING RANGE WITHOUT EXPRESSLY STATING THE SPECIFIC BASIS FOR CONCLUDING THAT THE APPELLANT'S CRIMINAL HISTORY CATEGORY OF VI WAS UNDERREPRESENTATIVE OF THE SERIOUSNESS OF

STATEMENT OF THE CASE

On July 26, 2000, Appellant, Gabino Garduno-Bustos, was indicted for being
“found”

requested that the district court not depart upward. (**Tr. 13**). However, the district court departed upward from a sentencing range of 24 to 30 months and imposed a sentence of 48 months in the Federal Bureau of Prisons. (**Tr. 15, D.R. 10**). The district court's departure significantly exceeded any upward departure contemplated by the plea agreement. **PSR, ¶ 10**.

As justification for this upward departure, the district court stated, "I agree with the

Addendum, 1-8). On June 14, 2001, the district court amended the judgment to recommend that the defendant be placed in the 500-hour Residential Drug and Alcohol Treatment program offered by the Federal Bureau of Prisons. **(D.R. 17).**

SUMMARY OF THE ARGUMENT

Pursuant to § 4A1.3 of the sentencing guidelines, district courts are authorized
to

sentencing range of 24 to 30 months to 48 months in that it failed to expressly and specifically

ARGUMENT

Issue I.

Whether, pursuant to § 4A1.3, the district court abused its discretion in departing upward from the presumptive sentencing range without expressly stating the specific basis for concluding that the Appellant's criminal history category of VI was underrepresentative of the seriousness of his criminal history or the risk of recidivism, or without expressly stating the analysis used in determining the actual sentence imposed.

A) STANDARD OF REVIEW

In reviewing a sentencing court's decision to depart from the sentencing guidelines, this Court is guided by the abuse of discretion standard of review. *United States v. Levi*, 229 F.3d 677, 679 (8th Cir. 2000) (citing *Koon v. United States*, 518 U.S. 81, 99-100 (1996)). This is specifically sf, 99-100
Koon,

***United States v. Thomas*, 914 F.2d 139, 143 (8th Cir. 1990)** (citations omitted).

Because the district court did not expressly state its analysis or basis for departing upward,

917 F.2d at 1063 n. 2.

As

