

IN THE UNITED STATES COURT OF APPEALS

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JURISDICTIONAL STATEMENT

This is an appeal by defendant of his conviction in the United States District Court for the Southern District of Iowa. Defendant pleaded guilty to violation of Title 8, § 1326, illegally being found in the United States after previous deportation. At sentencing before United States District Judge Robert W. Pratt, defendant unsuccessfully sought to receive a departure from his applicable guidelines sentence. The requested departure grounds was denied as a matter of law.

Notice of Appeal was timely filed by defendant. The United States Court of Appeals for the Eighth Circuit is founded in Title 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I.

**MAY A DISTRICT COURT DENY, ON LEGAL GROUNDS, A
DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE
ON CLAIM 7 (DEFENDANT'S 290e ASURT EPORTABLE ALIENS Tc 0.2)**

STATEMENT OF THE CASE

On November 15, 2000, Defendant JORGE ALFREDO PINA-Arellano was indicted for entering illegally in the United States after deportation in violation of Title

of defendant's sentencing guideline, and applied to everyone in his condition. As

¹ Reference is to the Pre-Sentence Investigation Report and to the applicable pages of the report.

downwards departure request which the defendant sought. The Defendant argued forhdownwards departure from the relevant guideline range upon his claim that as an alien he would be subjected to much harsher conditions while the defendant was servtiCmhis sentencemin custody of the Federal Bureau of Prisons. Although Defendant concededmhis argument in this case was contrary to current Eighth Circuit law, he advised the court that he sought to further raise the issue.

Defendant stated to the Court that he wished to preserve the departure issue in this case. (SentenctiCmc wii4cpat t pange4-5),t which was thesamre issue in ten

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² in the event of reversal of the priorhe pttiCmin*United States v. Cardoza-Rodriquez*, 241 F.3d 613 (8th Cir. 2001)

A decision by the District Court that departure from the Sentencing Guidelines was unavailable as a matter of law is reviewable on appeal. *United*

law, relying upon this circuit's precedent, handed down only months earlier. The factor cited by defendant was considered by the sentencing commission, and

decision. *See United States v. Reynolds*, 116 F.3d 328, 329 (8th Cir. 1997).

However, defendant's case is not appropriate for reversal of our past 8th Circuit position in any event. Even in the primary case relied upon by the Defendant,

United States v. SmithSee

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States

999 F.2d 640, 644-47 (2d Cir. 1993); *United States v. Nnanna*, 7 F.3d 420, 422 (5th Cir. 1993) (per curiam); *United States v. Bautista*, 258 F.3d 602, 606-08 (7th Cir. 2001); *United States v. Charry Cubillos*, 91 F.3d 1342, 1344-45 (9th Cir. 1996); *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990); *See also*

disparities in the sentences of similarly situated defendants. *See also, United States v. Sentamu*, 212 F.3d 127, 138 (2d Cir. 2000).

As the Defendant's claimed mitigating factors cited in this case are squarely within the contemplation of the Guidr-32.2tnwas sentenced under, no departure upon the particular mitigating basis raised can permitted as a matter of law. *United States v. Cardoza-Rodriquez*, 241 F.3d at 614. This Court should affirm the District Court.

CONCLUSION

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