

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 98-51027  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RODOLFO ESPINOZA-HERNANDEZ,

Defendant-Appellant.

- - - - -  
Appeal from the United States District Court  
for the Western District of Texas  
USDC No. SA-97-CR-43-ALL  
- - - - -

July 14, 1999

Before HIGGINBOTHAM, JONES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Rodolfo Espinoza-Hernandez (Espinoza) appeals his sentence for illegal reentry. He argues that the district court erred in determining that it was unable to depart under the extraordinary circumstances of his case, as is permitted by Koon v. United States, 518 U.S. 81, 106 (1996).

This court has jurisdiction if a refusal to depart downward was premised upon a mistaken conclusion that the guidelines do not permit such a departure, but lacks jurisdiction if the refusal was

---

\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

premised on a determination that a departure was not warranted under the facts of the case. United States v. Brace, 145 F.3d 247, 263 (5th Cir.)(en banc), cert. denied, 119 S. Ct. 426 (1998). The language used by the district court demonstrates that under the facts of this case, it did not believe that Espinoza's mental disorder was sufficient to warrant a downward departure. As a result, this court does not have jurisdiction to review the district court's refusal to downwardly depart, and therefore the APPEAL IS DISMISSED.

The Government has filed an unopposed motion requesting that the appellate briefs be placed under seal. This motion is GRANTED.