IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-40073

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO JAVIER GOMEZ-ALVAREZ,

Defendant-Appellant.

Appeal from the United States District Court For the Southern District of Texas (L-99-CR-713)

September 21, 2000

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Francisco Javier Gomez-Alvarez appeals the sentence imposed upon him following his plea of guilty to one count of illegal re-entry into the United States after deportation, in violation of 8 U.S.C. § 1326. We dismiss the appeal.

Gomez-Alvarez does not contest the well-settled principle that a district court's discretionary refusal to depart from the Sentencing Guidelines is not reviewable on appeal. However, he argues

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in $5^{\text{\tiny TH}}$ CIR.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

¹ <u>See United States v. Reyes-Nava</u>, 169 F.3d 278, 280 (5th Cir. 1999).

that statements made by the district court at the sentencing hearing suggest that it was unaware of its authority to grant a downward departure based on cultural assimilation and close family ties in the United States.² A perusal of the record reveals that the district court never expressed such a belief. Indeed, the court's language arguably reflects the contrary view - i.e., that the district court had such authority and that it refrained from granting a downward departure on cultural assimilation grounds under the facts of this case. Thus, at the sentencing hearing, the court asked Appellant's counsel how a downward departure would benefit Gomez-Alvarez, given that he would be deported anyway. Moreover, the court ultimately concluded that "the cultural assimilation [argument] is not going to work *in this case*... That is rejected" (emphasis added).

The sentencing court therefore exercised its discretion not to depart, rendering its decision unreviewable.³

APPEAL DISMISSED.

² A refusal to grant a downward departure is a violation of law only where a district court mistakenly asserts that it lacks the authority to depart. <u>See United States v. Yanez-Huerta</u>, 207 F.3d 746, 748 (5th Cir. 2000). Although other circuits have recognized the viability of the cultural assimilation argument, <u>see United States v. Lipman</u>, 133 F.3d 726, 730 (9th Cir. 1998), the posture of this case renders it unnecessary for us to decide this question (see infra).

³ See Reyes-Nava, 169 F.3d at 280.