

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20267
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PEDRO ZAMARRON-CERVANTES,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-97-CR-272-1
- - - - -

December 23, 1998

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

Pedro Zamarron-Cervantes appeals his sentence imposed by the district court for being present in the United States, without permission, following deportation. He argues that the district court did not provide notice of the specific grounds that it intended to use for an upward departure and that the district court improperly departed upward from the Sentencing Guidelines.

A district court may depart upward from the guidelines if the court finds that an aggravating circumstance exists that 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. 18 U.S.C. § 3553(b). The district court must state "the specific reason for the imposition of a sentence" outside the guideline range. 18 U.S.C. § 3553(c)(2). A district court's decision to depart from the guidelines is reviewed for an abuse of discretion. *United States v. Ashburn*, 38 F.3d 803, 807 (5th Cir. 1994)(en banc). A departure from the guidelines will be affirmed on appeal if (1) the district court gives acceptable reasons for departing, and (2) the extent of the departure is reasonable. *Id.*

A sentencing court must provide the parties an opportunity to comment upon matters relating to the appropriate sentence. Fed. R. Crim. P. 32(c)(1). Rule 32, Fed. R. Crim. P., requires that the district court give the parties reasonable notice that it is contemplating making an upward departure. *Burns v. United States*, 501 U.S. 129, 138 (1991). "This notice must specifically identify the ground on which the district court is contemplating an upward departure." *Id.*

We have reviewed the record and the briefs of the parties and conclude that the district court did not abuse its discretion in departing upward from the Sentencing Guidelines. The district court provided adequate reasons for its incremental upward departures. The district court demonstrated proper reliance on the guideline levels and consideration of the number and type of crimes committed. The departure was not unreasonably excessive in light of the defendant's extensive criminal history. A review of the record indicates that the Presentence Report addressed the

possibility of an upward departure and the grounds therefor and provided Zamarron-Cervantes with adequate notice.

The judgment of the district court is AFFIRMED.