

ORIGINAL

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6 CRUZ RUBALCAVA-RODRIGUEZ

7 UNITED STATES DISTRICT COURT
8 DISTRICT OF IDAHO
9 (The Honorable Edward J. Lodge)

9	UNITED STATES OF AMERICA,)	
)	CRO2-003-S-EJL
10	Plaintiff,)	
)	
11	v.)	DEFENDANT'S RESPONSE TO
)	GOVERNMENT'S OBJECTIONS
12	CRUZ RUBALCAVA-RODRIGUEZ,)	
	Defendant.)	
13)	

14 COMES NOW the defendant, CRUZ RUBALCAVA-RODRIGUEZ, by and
15 through his counsel, Samuel Richard Rubin and Federal Defenders of Eastern
16 Washington and Idaho, who hereby respectfully responds to the government's
17 objections to the presentence investigation report.

18 The government in this case, almost unbelievably, has suggested an upward
19 departure simply stating that the criminal history category does not adequately
20 reflect the seriousness of the defendant's past criminal conduct simply by quoting a
21 particular section under the Federal Sentencing Guidelines and then making a
22 conclusory statement that "the defendant's history suggests that he will very likely
23 commit additional crimes once he is released from prison and will likely come back

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1 to the United States to do so". It is not suggested by the government what crimes
2 are going to be committed once Mr. Rubalcava is released from prison or what
3 basis, if any there is for the statement that he will likely come back to the United
4 States. Is it based upon expert opinion which in all fairness could then be cross
5 examined, or simply a "gut feeling?"

6 Under the Federal Sentencing Guidelines, 18 U.S.C. § 3351, *et seq.* a
7 "district court must consider at sentencing both the nature of the defendant's
8 offense and his...overall criminal history", *United States v. Carillo-Alvarez*, 3 F.3d
9 316 (9th Cir. 1993). The court calculates the appropriate offense level numerically
10 by gaging its severity through an examination of the circumstances surrounding the
11 crime, *see U.S.S.G. Chapter 2* (1990), and determines the requisite criminal history
12 category by examining both the quality and the quantity of past offenses.
13 According to the United States Congress, the search curbs the "unwarranted
14 sentencing disparities" which once resulted from the unchecked use of judicial
15 discretion. *See United States v. Lira-Barraza*, 941 F.2d 745, 758 (9th Cir. 1991).
16 Thus, the government generally argues that departures from the federal sentencing
17 guidelines are justified only in atypical cases.

18 In the Ninth Circuit, only a record which is "significantly more serious" than
19 those of other defendant's in the same criminal history category would warrant an
20 upward departure. *United States v. Gayou*, 901 F.2d 746 (9th Cir. 1990). In this
21 case, the criminal history of Mr. Rubalcava for the most part involves
22 misdemeanors between the years 1994 and 1998 and a felony illegal reentry case.
23 There is no question that the robbery which took place in January, 1999, over

1 three years ago, is a more serious offense but Mr. Rubalcava is receiving the
2 maximum amount of points that can be assessed for that robbery in light of the
3 period of time that he was incarcerated. An upward departure for significant under
4 representation is appropriate only in an unusual case because the criminal history of
5 the sentencing guidelines is designed expressly to account for a defendant's prior
6 conduct. *United States v. Singleton*, 917 F.2d 411 (9th Cir. 1990). To provide
7 guidance regarding an upward departure, the sentencing commission lists
8 examples. The examples might include the case of a defendant who (1) has
9 several previous foreign sentences for serious offenses, (2) had received a prior
10 consolidated sentence of ten years for a series of serious assaults, (3) had a similar
11 instance of large scale fraudulent misconduct established by an adjudication in a
12 securities and exchange commission enforcement proceeding, (4) committed the
13 instant offense while on bail or pretrial release or another serious offense, or (5) for
14 appropriate reasons, such as cooperation in the prosecution of other defendant's,
15 had previously received an extremely lenient sentence for a serious offense. The
16 five examples listed in § 4A1.3 as possible grounds for a departure all make
17 reference to previous serious or large scale offenses which have not been included
18 in the criminal history calculation.

19 When a district court departs upward pursuant to § 4A1.3, it must specify
20 the particular facts of a defendant's history that illustrate why the defendant is
21 unlike other defendants in the same criminal category. *Singleton*, 917 F.3d at 412.
22 The district court must set forth the specific aspects of the defendant's criminal
23 history...that (it) believes have not been adequately represented in the

1 recommended sentence. The review is limited to the reasons actually given by the
2 sentencing court. The district court's findings must be sufficiently specific so that
3 the appellate court can engage in the meaningful review under the Sentencing
4 Reform Act. The circuit court will not search the record for permissible reasons for
5 departure, but will consider only the justification the district court actually advanced
6 at sentencing.

7 The mere fact that a defendant has a long criminal record will not of itself
8 support an upward departure. The Ninth Circuit has emphasized that it's the
9 quality of the defendant's criminal history not the quantity which is decisive.
10 Meaningful appellate review also requires that the court explain the role that each
11 factor played in the departure decision.

12 In this instance the government has advanced no basis or reason why §
13 4A1.3 applies nor does the government suggest in any way how they have come to
14 the conclusion without assistance of expert testimony or testing and results which
15 would support their hypothesis, that Mr. Rubalcava will likely commit additional
16 crimes once he is released from prison and would come back to the United States
17 to do so. To simply state that Mr. Rubalcava must be punished more severely
18 because he has reentered the United States when he is being prosecuted for that
19 very offense is to simply ask the trial court judge to do the government's work.

20 Unfortunately, the government is simply dissatisfied with the application of
21 the sentencing guidelines, as are we all.

22 RESPECTFULLY SUBMITTED this 12 day of June, 2002.

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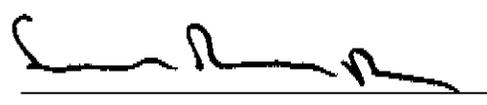


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CERTIFICATE OF SERVICE

I hereby certify that on 12 day of June, 2002, I served a true and complete copy of the herein and foregoing Defendant's Statement of No Objections To The Presentence Report upon Kim Lindquist, Assistant U.S. Attorney at Box 32, Boise, ID 38707 and Brent Flock, U.S. Probation Officer, MSC 032, Boise, ID 83724, by postage paid U.S. mail.



Samuel Richard Rubin