

**OCT 12 2004**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LUIS CHAVEZ-OROZCO,

Defendant - Appellant.

No. 03-50337

D.C. No. CR-02-00009-RMT

MEMORANDUM\*

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

LUIS CHAVEZ-OROZCO,

Defendant - Appellee.

No. 03-50391

D.C. No. CR-02-00009-RMT

Appeal from the United States District Court  
for the Central District of California  
Robert M. Takasugi, District Judge, Presiding

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Submitted October 5, 2004\*\*  
Pasadena, California

Before: HUG, T.G. NELSON, and WARDLAW, Circuit Judges.

Luis Chavez-Orozco appeals his sentence for violation of 8 U.S.C. § 1326 on the grounds that: (1) the district court failed to comply with the findings requirements of Federal Rule of Criminal Procedure 32, and (2) the district court impermissibly denied Chavez-Orozco's request for a downward departure. The Government cross-appeals the district court's three-level downward departure as impermissibly infringing on prosecutorial discretion. We do not have jurisdiction to review the district court's discretionary denial of a downward departure.<sup>1</sup> We have jurisdiction over the remaining claims pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and we vacate the sentence and remand for resentencing.

Chavez-Orozco alleged a legal, not a factual, dispute. The district court was therefore not required to make express findings under Federal Rule of

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\*\* This panel unanimously finds this case suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2).

<sup>1</sup> *See United States v. Smith*, 330 F.3d 1209, 1212 (9th Cir. 2003).

Criminal Procedure 32.<sup>2</sup> Accordingly, we reject Chavez-Orozco's argument for vacating his sentence.

The district court's three level departure impermissibly infringed on the prosecutor's choice not to offer a new deal after the prior one had been rejected.<sup>3</sup> Accordingly, we vacate the sentence and remand for resentencing without the three level departure based on the current record.

VACATED AND REMANDED.

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<sup>2</sup> See *United States v. Rearden*, 349 F.3d 608, 618-19 (9th Cir. 2003).

<sup>3</sup> See *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 976-77 (9th Cir. 2000).