

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CESAR BELTRAN-AVELLANEDA,
Defendant-Appellant.

No. 02-4766

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
William L. Osteen, District Judge.
(CR-02-82)

Submitted: March 12, 2003

Decided: April 22, 2003

Before WIDENER, MOTZ, and GREGORY, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

Louis C. Allen, III, Federal Public Defender, William S. Trivette,
Assistant Federal Public Defender, Greensboro, North Carolina, for
Appellant. Anna Mills Wagoner, United States Attorney, Angela H.
Miller, Assistant United States Attorney, Greensboro, North Carolina,
for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Cesar Beltran-Avellaneda appeals his conviction and sentence for illegally re-entering the United States after having been deported for an aggravated felony, in violation of 8 U.S.C. § 1326(a), (b)(2) (2000). Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), in which he states that there are no meritorious issues for appeal. Although notified of his right to submit a pro se supplemental brief, Beltran-Avellaneda has not done so.

Counsel presents for review the district court's failure to depart downward based on Beltran-Avellaneda's cultural assimilation. This court lacks jurisdiction to review the district court's refusal to depart downward unless that refusal is based on the court's mistaken belief that it lacked the power to depart. *United States v. Bayerle*, 898 F.2d 28, 30-31 (4th Cir. 1990). The record clearly indicates that the district court knew it had the power to depart but simply refused to depart. Therefore, this court lacks jurisdiction over Beltran-Avellaneda's appeal.

In accordance with *Anders*, we have reviewed the entire record in this case and have found no meritorious issues for appeal. Because this court requires that counsel inform his client, in writing, of his right to petition the Supreme Court of the United States for further review, we deny counsel's motion to withdraw at this time. If the client requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on the client.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED