

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

This

Title 28 U.S.C. § 3621	15
Title 21, United States Code, Section 841	1
Title 21, United States Code, Section 841(a)(1)	1
Title 21, United States Code, Section 841(a)(1) and 846	1
Title 21, United States Code, Section 853	1
18 U.S.C. §3553(b)	9, 13

OTHER AUTHORITIES

Section 5K2.0	8, 9
28 C.F.R. §550.58(a)(1)(i)	4
U.S.S.G. § 5K2.0	1, 2

JURISDICTIONAL STATEMENT

This appeal is taken from a judgment including sentence imposed by the Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.

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STATEMENT OF THE ISSUE

- I. **WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING A DOWNWARD DEPARTURE OF ONE YEAR ON A DRUG OFFENSE BASED ON THE DEFENDANT'S STATUS AS A DEPORTABLE ALIEN.**

Koon v. United States, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996)

STATEMENT OF THE CASE

A. NATURE OF THE CASE

On February 24, 2000, a five-count indictment was filed against Nolberto Lopez-Salas. (Filing No. 1). Count I charged him with conspiracy to distribute and possess with intent to distribute cocaine and methamphetamine from on or about January 15, 2000, to January 21, 2000, in violation of Title 21, United States Code, Section 841(a)(1) and 846. Count II charged possession with intent to distribute cocaine and methamphetamine on January 21, 2000, in violation of Title 21, United States Code, Section 841(a)(1). Count III charged possession with intent to distribute w (to distribute 9January 21, 2000, in violation of intent0 Tj -53.25 -342 7

aliens

month

mitigating factor it does not warrant a downward departure from the otherwise applicable guidelines.

This departure was also inappropriate because there was no showing that the defendant would have been eligible for the drug program or early release. To depart under the circumstances treats him as if he were eligible for the program, was admitted to it and successfully completed it. Furthermore, because he will be deported following incarceration, he will not have to serve the mandatory five years of supervised release, which could result in more prison time if he violated his release.

Under this standard, a court of appeals need not defer to the district court's determination of an issue of law, such

circumstance was adequately taken into consideration by the Commission,

3553(b). Congress instructed courts to ‘consider only the sentencing guidelines, policy
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1996) e comment, and official documents of the United States Sentencing Commission vs. K. diff. 518
iso 1772 I

U.S. at 92-93. The commentary to the United States Sentencing Guidelines,

Section 5K2.0 notes that “Heartland” cases should be “extremely rare.” “In the

absence of the characteristic or circumstance that distinguishes a case as

sufficiently atypical to warrant a sentence different than that called for under the

guidelines, a sentence outside the guideline range is not authorized... For examme2n5 -33 TD

with other cases encompassed by the same guideline. “If a factor is unmentioned in the Guidelines, the court must, after considering the structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,” decide whether it is sufficient to take the case out of the Guideline’s heartland. Koon, 518 U.S. at 96. The Supreme Court further stated, “The district court must make a refined assessment of the many facts bearing on the outcome.” Id. at 98. District courts must also “bear in mind the Commission’s expectations that departures based on grounds not mentioned in the Guidelines will be ‘highly infrequent.’” Id. at 96.

To depart downward on a ground applicable to every deportable alien with a drug problem convicted on a non-immigration charge would run counter to Koon's command grounds not merely deportable alien with

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subject to harsher conditions of confinement and was ineligible for community placement at the end of her sentence. The Ninth Circuit found that such findings, in

Even if the decision [not to depart on grounds of deportable alien

potentially

Pursuant to Rule 28A(d) of the Eighth Circuit Rules of Appellate Procedure, I hereby certify that the enclosed computer diskette containing the full text of the Appellee's Brief has been scanned for viruses and is virus-free. This brief was created using Corel WordPerfect Suite 9.

DATED this _____ day of February, 2001.