

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

RIR187FOR THE _____

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

This is an appeal by the United States from the sentence imposed by the district

Judgment in a Criminal Case, October 30, 2000 1

Excerpts from United States v. Lopez-Salas, Transcript of Sentencing,
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STATUTES

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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.

Federal jurisdiction over the subject matter of this case is proper pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Eighth Circuit has jurisdictionThis proper purs D - Tw (U.S.C Tf1, whichcasevide Appeuit haon) T -13.5 -33 TD .

STATEMENT OF THE ISSUE

I. WHETHER THE DISTRICT COURT ERRED IN GRANTING A DOWNWARD DEPARTURE OF ONE YEAR ON A DRUG OFFENSE BECAUSE OF 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)

United States v. Bahena, 223 F.3d 797 (8th Cir. 2000)

United States v. Navarro, 218 F.3d 895 (8th Cir. 2000)

STATEMENT OF THE CASE

A. NATURE OF THE CASE

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On April 20, 2000, a one-count indictment was filed against Jesse V. Ramos.
(Filing No. 1). Count I charged him with possession with intent to distribute 500
grams

The district court departed downward by one year from the calculated guidelines range and imposed a sentence of 156 months' imprisonment. (Filing No. 27).

B. STATEMENT OF THE FACTS

On March 27, 2000, the Omaha, Nebraska Police Department found more than hereap. 3 0.38Tsnagreed t in thaamidicalnd moreOn

testified generally concerning the impact of alien status on a defendant's confinement.

the final six months of their sentences. (Lopez-Salas Tr. p. 11, 14, 17). (Add. p. 16, 19, 22).

The district court in the present case relied on those two factors relating to length of confinement in concluding that Ramos should receive a one-year downward departure. (United States v.

deportable alien] restricts his access to Bureau of Prison's early release programs that are otherwise accessible to the general prison population and to specific categories of the prison population to which the defendant belongs, to-wit, drug treatment and early release." (Judgment in a Criminal Case, hereafter J&C, p. 6). (Addendum, hereafter Add. p. 6).

This departure was inappropriate because the fact that Ramos was committing the additional offense of illegal reentry after deportation when he was caught trafficking drugs is not a mitigating circumstance. Assuming that it is a 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

ARGUMENT

**THE DISTRICT COURT ERRED IN GRANTING A DOWNWARD
DEPARTURE**

Sentencing

sentence

To depart

many facts bearing on the outcome.' The district court should consider why Cubillos is ineligible for minimum security and community confinement 'bear[ing] in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'

Charry Cubillos

upholding district court decisions not to depart suggest that an abuse of discretion exists here. United States v. Bahena, 223 F.3d 797, 807 (8th Cir. 2000), involved a defendant's claim that a downward departure based on deportable alien status was improperly denied because that status produced harsher conditions of confinement, including

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Angel-Martinez, 988 F. Supp. 475 (D. N.J. 1997) (provisio32lying alien5

CONCLUSION

For the reasons stated above, or the United States

CERTIFICATION OF DISKETTE

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