

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-21147
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALEXIS OLARTE,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-95-CR-161-7
- - - - -

October 23, 1997

Before POLITZ, Chief Judge, and WIENER and DENNIS, Circuit Judges.

PER CURIAM:*

Alexis Olarte challenges the district court's application of a two-level enhancement for his possession of a firearm pursuant to U.S.S.G. § 2D1.1(b). Olarte's plea agreement contained a waiver-of-appeal provision whereby he waived his right to appeal his sentence except as to any sentence imposed above the statutory maximum or a sentence that was the result of an upward departure or mathematical error. We have reviewed the briefs and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

the record and conclude that the waiver was informed and voluntary and is therefore binding on Olarte. United States v. Portillo, 18 F.3d 290, 292-93 (5th Cir. 1994). Because Olarte's sentence was not above the statutory maximum or the result of an upward departure or mathematical error, he has waived his right to appeal his sentence. United States v. Melancon, 972 F.2d 566, 567-68 (5th Cir. 1992). His appeal is without arguable merit and thus frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is dismissed. See 5TH CIR. R. 42.2.

APPEAL DISMISSED.