

July 10, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40305
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JORGE RIOS-JOAQUINA,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:04-CR-108-ALL

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Jorge Rios-Joaquina (Rios) appeals the 60-month sentence that he received after he pleaded guilty to illegal reentry by a deported alien. Rios argues that the district court violated his due process rights when it upwardly departed without stating on the record that aggravating or mitigating circumstances were present that had not been considered by the Sentencing Commission when it formulated the Guidelines. Rios argues, alternatively,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

that if United States v. Booker, 543 U.S. 220 (2005), applies, the upward departure was unreasonable.

Rios fails to meet his burden of showing that the district court's post Booker, non-guidelines sentence, which was an upward deviation from the guidelines range of imprisonment, was error, plain or otherwise. See United States v. Jones, 444 F.3d 430, 434-36 (5th Cir. 2006); United States v. Smith, 440 F.3d 704, 707-10 (5th Cir. 2006).

AFFIRMED.