

FEB 27 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE OLIVERA ZAPIEN,

Defendant - Appellant.

No. 13-10260

D.C. No. 2:09-cr-00358-WBS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted February 18, 2014**

Before: ALARCÓN, O’SANNLAIN, and FERNANDEZ, Circuit Judges.

Jose Olivera Zapien appeals from the district court’s judgment and challenges the 121-month sentence imposed following his guilty-plea conviction for possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Zapien contends that the district court erred at sentencing by relying on a clearly erroneous fact, namely, that his codefendants were involved only with marijuana and not with methamphetamine. We review for plain error. *See United States v. Burgum*, 633 F.3d 810, 812 (9th Cir. 2011). Zapien's argument fails because he has not established a reasonable probability that his sentence would have been different absent the error. *See United States v. Dallman*, 533 F.3d 755, 762 (9th Cir. 2008).

Zapien also contends that his sentence is substantively unreasonable in light of the disparities between his sentence and those of his codefendants. The district court did not abuse its discretion in imposing the sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007). The low-end Guidelines sentence is substantively reasonable in light of the totality of the circumstances and the 18 U.S.C. § 3553(a) sentencing factors. *See id.*

AFFIRMED.