

FILED

October 5, 2006

Charles R. Fulbruge III
Clerk

REVISED JANUARY 26, 2007
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-40472
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GILBERTO GARCIA-LOZANO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:05-CR-1019-ALL

Before JONES, Chief Judge, and SMITH and STEWART, Circuit Judges.

PER CURIAM:*

Appealing the Judgment in a Criminal Case, Gilberto Garcia-Lozano raises arguments that are foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998), which held that 8 U.S.C. § 1326(b)(2) is a penalty provision and not a separate criminal offense; by United States v. Garcia-Mendez, 420 F.3d 454 (5th Cir. 2005), cert. denied, 126 S. Ct. 1398 (2006), which held that a Texas conviction for burglary of a habitation was equivalent to burglary of a dwelling; and by United States v.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Carmichael, 343 F.3d 756, 761-62 (5th Cir. 2003), which held that a challenge to the district court's order requiring the defendant to cooperate in the collection of a DNA sample as a condition of supervised release is not ripe for review on direct appeal. The Government's motion for summary affirmance is GRANTED.

JUDGMENT AFFIRMED; APPEAL DISMISSED IN PART.