

FILED

June 23, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 03-50746
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OCTAVIO LOZOYA, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-02-CR-1853-1-RF

Before BARKSDALE, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Octavio Lozoya, Jr., appeals his guilty plea conviction for conspiracy to harbor an illegal alien with death resulting and harboring an illegal alien with death resulting. Lozoya argues that the appeal-waiver provision in his plea agreement should not be enforced to bar his challenge to his consecutive sentence. He concedes that his argument is foreclosed by our opinion in United States v. Melancon, 972 F.2d 566 (5th Cir. 1992), and its

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

progeny. He raises the issue to preserve it for possible Supreme Court review.

A panel of this court cannot overrule a prior panel's decision in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court. Burge v. Parish of St. Tammany, 187 F.3d 452, 466 (5th Cir. 1999). No such decision overruling Melancon exists. Accordingly, Lozoya's argument is indeed foreclosed. The judgment of the district court is AFFIRMED.

The Government has moved for a summary affirmance in lieu of filing an appellee's brief. In its motion, the Government asks that an appellee's brief not be required. The motion is GRANTED.

AFFIRMED; MOTION GRANTED.