

June 21, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-50639  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS JAIME GARCIA-HERNANDEZ,  
also known as Jesus Garcia,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:04-CR-50-3-SS  
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Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Jesus Jaime Garcia-Hernandez (Garcia) appeals the sentence imposed following his guilty-plea conviction for conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. He challenges the district court's calculation of his offense level under the United States Sentencing Guidelines. He does not address his waiver, pursuant to his plea agreement, of his right to appeal.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

The record demonstrates that Garcia's appeal waiver was informed and voluntary. See United States v. Portillo, 18 F.3d 290, 292-93 (5th Cir. 1994); United States v. Melancon, 972 F.2d 566, 567 (5th Cir. 1992). The only appeal rights reserved by Garcia were the right to appeal any upward departure imposed pursuant to U.S.S.G. § 5K2.0 and the right to raise constitutional challenges regarding the effectiveness of counsel or regarding prosecutorial misconduct. Garcia's challenges to the district court's calculation of his offense level are not appeal bases excepted from the waiver. See United States v. Gaitan, 171 F.3d 222, 223-24 (5th Cir. 1999).

Although the Government asserted the appeal waiver in its brief, defense counsel did not file a reply brief. He has therefore failed to address the threshold issue before this court. Garcia's appeal is therefore without arguable merit and is DISMISSED as frivolous. See 5TH CIR. R. 42.2; Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983).

APPEAL DISMISSED AS FRIVOLOUS.