

October 25, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20524
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EMILIANO LUGO-VARGAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CR-534-ALL

Before JOLLY, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Emiliano Lugo-Vargas (Lugo) appeals following his guilty plea to being an alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5). He argues that § 922(g)(5) is facially unconstitutional and, in the alternative, that the statute is unconstitutional as applied because the factual basis of his plea failed to establish the interstate commerce element. Lugo concedes that his constitutional challenge is foreclosed by circuit precedent, and he raises it only to preserve it for review by the Supreme Court. We have held that "the

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

constitutionality of § 922(g) is not open to question," United States v. Daugherty, 264 F.3d 513, 318 (5th Cir. 2001)(internal quotation marks omitted), and, additionally, that the Government need only establish that the firearm was manufactured out of state to satisfy the interstate commerce element of the offense. See United States v. Guidry, 406 F.3d 314, 318-19 (5th Cir.), cert. denied, 126 S. Ct. 190 (2005).

AFFIRMED.