

August 25, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20607
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOEL HERNANDEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:05-CR-86-1

Before DAVIS, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

Joel Hernandez appeals his conviction for being an alien in possession of a firearm. He argues that the statute of conviction, 18 U.S.C. § 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.

Hernandez concedes that his constitutional challenge is foreclosed by circuit precedent, and he raises it only to

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

preserve its further review by the Supreme Court. We have indeed held that "the 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.