

November 9, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20896
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE HERNANDEZ, also known as Jose R. Hernandez, also known
as Jose Refugio Hernandez, also known as Jose
Hernandez-Refugio,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:05-CR-263-ALL

Before BARKSDALE, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:*

Appealing the Judgment in a Criminal Case, Jose Hernandez
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, and by United States v. Riascos-Cuenu, 428 F.3d 1100,
1101-02 (5th Cir. 2005), petition for cert. filed (U.S. Jan. 9,
2006) (No. 05-8662), which held that a challenge to the district
court's order requiring the defendant to cooperate in 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this opinion should not be published and is not precedent except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.

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.