

February 7, 2007

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-41087
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FAUSTINO DIAZ-RODRIGUEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:06-CR-125-ALL

Before REAVLEY, JOLLY, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appealing the Judgment in a Criminal Case, Faustino Diaz-Rodriguez raises arguments that are foreclosed by United States v. Garcia-Mendez, 420 F.3d 454, 457 (5th Cir. 2005), cert. denied, 126 S. Ct. 1398 (2006), which held that a Texas conviction for burglary of a habitation was equivalent to burglary of a dwelling and therefore was a crime of violence under U.S.S.G. § 2L1.2, and 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

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

offense. The Government's motion for summary affirmance is GRANTED, and the judgment of the district court is AFFIRMED.