

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 17-40916  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

July 30, 2019

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALBERTO CRUZ,

Defendant-Appellant

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 7:16-CR-1671-1

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Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:\*

Alberto Cruz appeals the 51-month guidelines sentence and 3-year term of supervised release imposed following his guilty plea conviction for possession with intent to distribute less than 50 kilograms of marijuana. He argues that the district court plainly erred by determining that his 2001 Texas conviction for robbery qualified as a crime of violence under U.S.S.G. § 4B1.2(a). The Government has filed a motion for summary affirmance

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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arguing that Cruz's argument is foreclosed by *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006), *overruled on other grounds by United States v. Rodriguez*, 711 F.3d 541, 548 (5th Cir. 2013) (en banc).

Cruz argues that *Santiesteban-Hernandez* does not control because it did not address the difference in the *mens rea* requirements of the Texas statute and the generic offense of robbery. He argues that a subsequent Texas case defining the elements of the Texas robbery statute, *Howard v. State*, 333 S.W.3d 137, 140 (Tex. Crim. App. 2011), establishes that the Texas statute is broader than the generic definition of robbery. We have recently rejected this argument, albeit in an unpublished decision. *United States v. Oerther*, 758 F. App'x 365, 366 (5th Cir. 2019). Given the foregoing, Cruz cannot show that any error in classifying his Texas robbery as a crime of violence is clear or obvious rather than subject to reasonable dispute. *See Puckett v. United States*, 556 U.S. 129, 135 (2009); *see also United States v. Guerrero-Robledo*, 565 F.3d 940, 946 (5th Cir. 2009). As Cruz effectively concedes as much, summary affirmance is appropriate.

Accordingly, the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the joint motion to hold this matter in abeyance pending a decision in *Oerther* is DENIED as moot. The judgment of the district court is AFFIRMED.