

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-60736  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAVIER RODRIGUEZ-HERNANDEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas

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(CR-L-94-101-1)

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(June 13, 1995)

Before POLITZ, Chief Judge, EMILIO M. GARZA and STEWART, Circuit Judges.

PER CURIAM:\*

Javier Rodriguez-Hernandez appeals his sentence, challenging the 16 point increase under U.S.S.G. §2L1.2(b)(2) in his base offense computation. Finding this appeal controlled by our recent

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

decision in **United States v. Rodriguez-Guzman**,<sup>1</sup> we affirm.

### **Background**

In the early morning hours of April 1, 1988, Rodriguez broke into a commercial building in Laredo, Texas. Police dispatched to the scene discovered Rodriguez inside the store behind the cash register. He was arrested for burglary, convicted under the Texas burglary statute,<sup>2</sup> and sentenced to six years probation. He was released into the custody of the Immigration and Naturalization Service which deported him to Mexico.

On March 15, 1990, police officers in Laredo again arrested Rodriguez after he and an accomplice robbed an individual at gunpoint. Rodriguez pled guilty to aggravated robbery and was sentenced to seven years imprisonment. He was paroled on April 22, 1992. The next day, the INS deported him to Mexico.

On April 20, 1994, Border Patrol agents received information that a known smuggler of aliens had been seen driving alone in a brown Camaro in an area where aliens are often smuggled across the Mexican border. When agents spotted the vehicle, it carried four passengers. Suspecting the smuggling of undocumented aliens, agents stopped the car to conduct an immigration inspection. Rodriguez was one of the passengers; he admitted that he had just reentered the United States by swimming across the Rio Grande river.

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<sup>1</sup>No. 94-60379 (5th Cir. June \_\_, 1995).

<sup>2</sup>Tex. Penal Code §30.02.

Rodriguez pled guilty to one count of illegal reentry into the United States in violation of 8 U.S.C. §1326(b). At sentencing, because of his prior deportation after conviction for an aggravated felony the district court increased Rodriguez's base offense level by 16 points under U.S.S.G. §2L1.2. The aggravated felony requirement was satisfied by either the burglary conviction or the aggravated robbery conviction. The district court rejected Rodriguez's objections to the sentencing computation, calculated a range of 57 to 71 months imprisonment, and sentenced him to 60 months imprisonment followed by three years of supervised release. Rodriguez timely appealed his sentence contending only that his Texas burglary conviction is not an aggravated felony warranting a 16 level increase under §2L1.2(b)(2).

#### **Discussion**

In **United States v. Rodriguez-Guzman**, we held that a felony conviction under section 30.02 of the Texas Penal Code for the burglary of a nonresidential building was an "aggravated felony" as that term is used in U.S.S.G. §2L1.2(b)(2). That decision is dispositive of the issue presented herein and, accordingly, the sentence of the district court is AFFIRMED.