

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

February 18, 2009

No. 08-40167
Conference Calendar

Charles R. Fulbruge III
Clerk

EMILIANO BARAJAS-DIAS

Petitioner-Appellant

v.

FRANCISCO QUINTANA, Warden

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:07-CV-585

Before HIGGINBOTHAM, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Emiliano Barajas-Dias (Barajas), federal prisoner # 08627-085, has appealed the district court's order dismissing his application for a writ of habeas corpus challenging his 1997 conviction of engaging in a continuing criminal enterprise. Barajas contends that he has suffered a miscarriage of justice because he is actually innocent in light of *Richardson v. United States*, 526 U.S. 813, 815 (1999), and that the district court erred in refusing to permit him 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

assert his *Richardson* claim in a 28 U.S.C. § 2241 proceeding under the Savings Clause of 28 U.S.C. § 2255(e).

Barajas asserted his *Richardson* claim previously in a motion under § 2255. *United States v. Barajas-Diaz*, 313 F.3d 1242, 1245-49 (10th Cir. 2002). Thus, the claim was not foreclosed at the time Barajas filed his § 2255 motion, and the district court did not err in determining that Barajas's *Richardson* claim may not now be brought under § 2241. *See Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001).

AFFIRMED.