APPENDIX A

United States v. Vega-Garcia,
893 F.3d 326 (5th Cir. 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50392

United States Court of Appeals
Fifth Circuit
FILED
June 25, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

BENJAMIN VEGA-GARCIA, also known as Carlos Moreno Molina,

Defendant - Appellant

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

Before JOLLY, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

Benjamin Vega-Garcia challenges only his sentence following his conviction on a guilty plea for being found in the United States following a prior deportation in violation of 8 U.S.C. § 1326. We review de novo the district court's interpretation and application of the Guidelines, including its determination that a defendant's prior conviction qualifies as a crime of violence ("COV") under § 2L1.2. *See United States v. Diaz-Corado*, 648 F.3d 290, 292 (5th Cir. 2011) (per curiam). We AFFIRM.

Relevant to the matter in dispute here, the pre-sentence report ("PSR") addressed Vega-Garcia's prior conviction under Florida law for abuse of an elderly or disabled adult. The PSR originally considered the 2015 Guidelines

then in effect and concluded that the Florida conviction constituted a COV, warranting a 16-level increase under § 2L1.2(b)(1)(A)(ii), which would yield a Guidelines range of 57-71 months. Vega-Garcia objected that it was not a COV, yielding only an 8-level increase under § 2L1.2(b)(1)(C), yielding a Guidelines range of 24-30 months. By the time of his sentencing, the then-current Guidelines were the 2016 Guidelines, which changed the COV analysis. The district court determined that under the 2016 Guidelines, the proper range would be 37-46 months and, having overruled Vega-Garcia's objection, determined that this was the correct Guidelines range to apply as the 2015 range of 57-71 months would be higher.

After calculating and considering all of these ranges, the district court observed that Vega-Garcia had once again entered the United States unlawfully, despite previously being convicted of a § 1326 violation and serving a 60-month sentence. Specifically, considering Vega-Garcia's requested range of 24-30 months, the district judge stated: "If 60 months didn't get his attention, are you telling me 24 to 30 now will?" The district court also stated several times that Vega-Garcia had numerous uncounted offenses. The district court thus determined that an above-Guidelines sentence was necessary in light of the previous sentence not succeeding in dissuading Vega-Garcia from continuing to enter the country unlawfully.

The Government does not defend the determination that the Florida elder abuse statute qualifies as a COV. Instead, it argues harmless error. We have previously established at least two methods for the Government to show the district court would have imposed the same sentence. "One is to show that the district court considered both ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way." *United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir.), *cert. denied*, 138 S. Ct. 524 (2017). The other method is for the Government to

"convincingly demonstrate both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing." *Id.* (internal brackets omitted) (quoting *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010)).

We conclude that the Government meets the first test. The district court considered the different potential Guidelines and would have arrived at the same sentence under any of them. We agree with Vega-Garcia that it would be easier for everyone if the district court had expressly used the "magic words" of *Guzman-Rendon*. However, in the busy day-to-day world of a district court sentencing courtroom, we have been loath to demand "magic words" or "robotic incantations" from district judges. *United States v. Fraga*, 704 F.3d 432, 439 (5th Cir. 2013). Having considered the sentencing transcript in its totality, it is clear that the district court concluded that the 72-month sentence was necessary in light of Vega-Garcia's recidivism. We pretermit consideration of the question of whether the Florida conviction was a COV because we conclude that any error in the assessment of the Florida elder abuse conviction was harmless.

AFFIRMED.

APPENDIX B

Indictment
United States v. Vega-Garcia,
SA-16-CR-250,
March 2, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA	§	Cause No.:
	§	
	§	
v.	§	**INDICTMENT**
	§	
BENJAMIN VEGA-GARCIA, a/k/a CARLOS MORENO MOLINA	§	[Vio: 8 U.S.C. § 1326(a) & (b)(1)/(2): Illegal Re-entry into the United States.]

THE GRAND JURY CHARGES:

DR16CR0250

COUNT ONE
[8 U.S.C. § 1326(a) & (b)(1)/(2)]

That on or about February 1, 2016, in the Western District of Texas, Defendant,

BENJAMIN VEGA-GARCIA, a/k/a
CARLOS MORENO MOLINA

an alien, attempted to enter, entered, and was found in the United States having previously been denied admission, excluded, deported and removed from the United States on or about January 16, 2015, and that the Defendant had not received the consent of the Attorney General of the United States and the Secretary of the Department of Homeland Security, to reapply for admission to the United States, in violation of Title 8, United States Code, Section 1326(a) and (b)(1)/(2).

A TRUE BILL.

FOREPERSON

RICHARD L. DURBIN, JR.
United States Attorney

By: _____
GORAN KRNJACH
Assistant United States Attorney

17-50392.14

APPENDIX C

8 U.S.C. § 1326

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the

provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) [2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Notes of Decisions (1300)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. Section 1252 of this title, was amended by Pub.L. 104-208, Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in section 1252(h)(2) of this title, see 8 U.S.C.A. § 1231(a)(4).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 115-173. Also includes P.L. 115-176 to 115-178. Title 26 current through 115-182.