APPENDIX A

United States v. Melendez-Davila,
No. 19-50987
(5th Cir. Dec. 3, 2020) (per curiam)

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 3, 2020
Lyle W. Cayce
Clerk

No. 19-50987

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROEL GILBERTO MELENDEZ-DAVILA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:19-CR-01780

Before CLEMENT, HO, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Roel Gilberto Melendez-Davila pleaded guilty to illegal reentry under 8 U.S.C. § 1326(a). At sentencing, the district court imposed a four-level enhancement under U.S.S.G. § 2L.1.2(b)(3)(D), which applies if the defendant committed a felony after his first removal. The district court relied on Melendez-Davila's Kansas conviction for conspiracy to commit

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

aggravated escape from custody, for which he was sentenced to eight months' imprisonment and twelve months' probation. *See* KAN. STAT. ANN. §§ 21-5911(b)(1)(A), 21-5302. Melendez-Davila did not object to this enhancement. After assessing other enhancements that Melendez-Davila does not challenge on this appeal, the district court imposed a sentence of forty-six months, at the lower end of the guideline range of forty-six to fifty-seven months.

Melendez-Davila makes two arguments, both raised for the first time on appeal. First, he argues that 8 U.S.C. § 1326(a) is unconstitutional. He correctly concedes that this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998), but he presents the issue to preserve it for further possible review. Second, he argues that the district court plainly erred in assessing an enhancement for a felony conviction because his previous Kansas conviction was not punishable by more than one year in prison. Finding no plain error, we affirm.

We review challenges to Guidelines enhancements raised for the first time on appeal for plain error. *See United States v. Chavez-Hernandez*, 671 F.3d 494, 497 (5th Cir. 2012). To rise to the level of plain error, a "legal error must be clear or obvious, rather than subject to reasonable debate." *Puckett v. United States*, 556 U.S. 129, 135 (2009). Accordingly, "[t]here is no plain error if the legal landscape at the time showed the issue was disputed, even if . . . the district court turns out to have been wrong." *United States v. Rodriguez-Parra*, 581 F.3d 227, 230 (5th Cir. 2009). "We ordinarily do not find plain error when we have not previously addressed an issue." *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009) (quoting *United States v. Lomas*, 304 F. App'x 300, 301 (5th Cir. 2008)).

The Guidelines define a "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year."

U.S.S.G. § 2L1.2 cmt. 2. This court looks to the maximum statutory term of imprisonment, rather than the length of the defendant's actual sentence, in determining whether to classify an offense as a felony. *See United States v. Rivera-Perez*, 322 F.3d 350, 352 (5th Cir. 2003).

Kansas criminal statutes do not specifically prescribe maximum penalties. *See United States v. Brooks*, 751 F.3d 1204, 1205–06 (10th Cir. 2014) (describing Kansas's "rather unusual criminal sentencing scheme"). Rather, under the Kansas sentencing guidelines, a sentence is determined by two factors: the severity level of the crime of conviction—which is provided by the statute of conviction—and the offender's criminal history. *See* KAN. STAT. ANN. § 21-6804. Each sentence is imposed based on a two-dimensional grid, much like the federal sentencing table. "The grid's vertical axis is the crime severity scale which classifies current crimes of conviction. The grid's horizontal axis is the criminal history scale which classifies criminal histories." *Id.* § 21-6804(c).

Melendez-Davila's conviction for conspiracy to commit aggravated escape from custody is a level ten offense. *See id.* §§ 21-5911(c)(2)(A), 21-5302(d)(1). His criminal history classification was "level E." Kansas's sentencing grid gave the court discretion to sentence Melendez-Davila to a term of imprisonment ranging from seven to nine months. *See id.* § 21-6804. If Melendez-Davila's criminal history was "level A," however, he would have faced up to thirteen months' imprisonment for his level ten offense. *See id.*

Melendez-Davila argues that his Kansas conviction should not be classified as a "felony" because his criminal history and offense severity only exposed him to a maximum penalty of nine months' imprisonment, and thus he did not commit an offense "punishable by imprisonment for a term exceeding one year." U.S.S.G. § 2L1.2 cmt. 2. In support, Melendez-Davila

points to *Brooks*, 751 F.3d 1204 and *United States v. Haltiwanger*, 637 F.3d 881 (8th Cir. 2011), which held that when determining the maximum sentence of imprisonment a defendant could have received under Kansas law, "the hypothetical possibility that some recidivist defendants could have faced a sentence of more than one year is not enough to qualify [the defendant's] conviction as a felony." *Brooks*, 751 F.3d at 1211 (quoting *Haltiwanger*, 637 F.3d at 884). Instead, "the maximum amount of prison time a *particular* defendant could have received controls." *Id.* at 1213; *see also Haltiwanger*, 637 F.3d at 884.

We need not decide whether the district court erred, for any error certainly was not plain error. Although other circuits have addressed this aspect of Kansas's sentencing scheme, it is an issue of first impression for this court. "We ordinarily do not find plain error when we have not previously addressed an issue." *Evans*, 587 F.3d at 671 (quotation omitted). To the contrary, we have previously rejected similar arguments in multiple unpublished opinions. *See United States v. Colin-Fajardo*, 278 F. App'x 340, 341–42 (5th Cir. 2008) ("The focus of the inquiry is on whether the offense carries a potential sentence of more than one year, rather than on whether an individual defendant convicted of that offense meets the criteria for a sentence of more than one year."); *United States v. Cedillos*, 191 F. App'x 322, 323–24 (5th Cir. 2006) (similar).

To be sure, these cases relied on *United States v. Harp*, 406 F.3d 242, 246 (4th Cir. 2005), which interpreted North Carolina's similar sentencing structure and was later overruled by a divided en banc Fourth Circuit in *United States v. Simmons*, 649 F.3d 237, 241 (4th Cir. 2011). *See Simmons*, 649 F.3d at 244 ("As in North Carolina, the Kansas sentencing structure ties a particular defendant's criminal history to the maximum term of imprisonment.") (quotation omitted). And this court has granted several unopposed motions to vacate and remand for sentencing based on *Simmons*'s

reinterpretation of North Carolina's sentencing scheme. *See United States v. Fajardo-Galvan*, 694 F. App'x 327, 329 (5th Cir. 2017) (collecting cases). But those unpublished Fifth Circuit decisions rejecting similar arguments have not been disturbed by this circuit. *See United States v. Castro-Magama*, 465 F. App'x 370, 372 (5th Cir. 2012) (holding that it was not plain error to follow *Harp* after it was overruled by *Simmons* or follow Fifth Circuit cases based on *Harp*). Thus, we reach the same conclusion as *Castro-Magama*: "[W]e cannot say, in light of the 'legal landscape,' that the district court's application of the [§ 2L.1.2(b)(3)(D)] enhancement was clear or obvious error." 465 F. App'x at 372 (quoting *Rodriguez-Parra*, 581 F.3d at 230). *See also United States v. Recinos-Hernandez*, 772 F. App'x 115, 116–17 (5th Cir. 2019) (reaching a similar conclusion for a Washington state conviction based on an unpublished Fifth Circuit opinion even though it conflicted with a subsequent Ninth Circuit opinion); *United States v. Guerrero–Robledo*, 565 F.3d 940, 946 (5th Cir. 2009) ("It certainly is not plain error for the district court to rely on an unpublished opinion that is squarely on point.").

Melendez-Davila also argues that the Supreme Court's decision in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), establishes that the district court plainly erred. Not so. That case dealt with the distinct question of whether a state conviction would qualify as a federal felony under the Immigration and Nationality Act—not how to determine a maximum sentence under Kansas law. To agree with Melendez-Davila, we would therefore have to extend *Carachuri-Rosendo*. But "[a]n error is not plain under current law if a defendant's theory requires the extension of precedent." *United States v. Lucas*, 849 F.3d 638, 645 (5th Cir. 2017) (quoting *United States v. Trejo*, 610 F.3d 308, 319 (5th Cir. 2010)).

We affirm.

APPENDIX B

United States v. Melendez-Davila,
Indictment,
No. 3:19-CR-1780 KC
(W.D. Tex. June 12, 2019)

JUDGE KATHLEEN CARDONE

FILED

2019 JUN 12 PM 12:48

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	§	**CRIMINAL NO. EP-19-CR-**
	§	
Plaintiff,	§	**INDICTMENT**
	§	
v.	§	**CT 1:** 8 U.S.C. § 1326(a) - Illegal Re-Entry
	§	
ROEL GILBERTO MELENDEZ-DAVILA,	§	
	§	
Defendant.	§	

EP19CR1780

THE GRAND JURY CHARGES:

COUNT ONE
(8 U.S.C. § 1326(a))

On or about May 17, 2019, in the Western District of Texas, Defendant,

ROEL GILBERTO MELENDEZ-DAVILA,

an alien, who had previously been excluded, deported, and removed from the United States on or about May 19, 2017, attempted to enter, entered, and was found in the United States, without having previously received express consent to reapply for admission from the United States Attorney General and the Secretary of Homeland Security, the successor pursuant to Title 6, United States Code, Sections 202(3), 202(4) and 557, in violation of Title 8, United States Code, Section 1326(a).

A TRUE BILL.

ORIGINAL SIGNATURE
REDACTED PURSUANT TO
E-GOVERNMENT ACT OF 2002

FOREPERSON OF THE GRAND JURY

JOHN F. BASH
UNITED STATES ATTORNEY

BY: _____
Assistant U.S. Attorney

19-50987.17

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.