

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

United States Court of Appeals
Fifth Circuit

FILED

July 5, 2018

Lyle W. Cayce
Clerk

No. 16-41000
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee Cross-Appellant

v.

GABRIEL VELA,

Defendant-Appellant Cross-Appellee

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 2:15-CR-429-1

Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Gabriel Vela was convicted of felony possession of firearms and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and he was sentenced to 46 months of imprisonment. On appeal, he argues that the district court erred by increasing his base offense level pursuant to U.S.S.G. § 2K2.1(a)(3) based on its finding that his prior Texas burglary convictions were enumerated offenses constituting crimes of violence. The Government

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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cross-appeals, arguing that the district court erred in failing to treat these prior burglary offenses as violent felonies for purposes of an enhancement under the Armed Career Criminal Act (ACCA).

We recently held in *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), that the Texas burglary statute, Texas Penal Code § 30.02(a), is indivisible and broader than generic burglary as enumerated in the ACCA. In *United States v. Godoy*, 890 F.3d 531, 536 (5th Cir. 2018), we established that this holding extends to the definition of crime of violence under the Guidelines. In light of *Herrold* and *Godoy*, the district court erred by concluding that Vela's Texas burglary conviction was an enumerated offense constituting a crime of violence under § 2K2.1(a)(3). With respect to the Government's cross-appeal, *Herrold* makes clear that the district court was correct in refusing to apply the ACCA based upon Vela's prior Texas burglary offenses.

Accordingly, we VACATE Vela's sentence and REMAND for resentencing consistent with this opinion.