No. 12-20571

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JESUS MENDOZA ZAMORA,
also known as Jesus Zamora Mendoza, also known as Jesus Mendoza,
also known as Jesus Mendoza-Zamora, also known as Jesus Z. Mendoza,
also known as Jesus Mendozz,
Defendant-Appellant.

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

REPLY BRIEF FOR APPELLANT

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STATEMENT OF THE REPLY ISSUE

Whether the district court reversibly erred in applying an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C), because Mr. Mendoza Zamora did not have a qualifying "aggravated felony" under 8 U.S.C. § 1101(a)(43).

ARGUMENT

REPLY ISSUE RESTATED: The district court reversibly erred in applying an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C), because Mr. Mendoza Zamora did not have a qualifying "aggravated felony" under 8 U.S.C. § 1101(a)(43).

(Responsive to Gov't Br. 7-10)

A. Introduction.

In his opening brief, Mr. Mendoza Zamora argued that the district court erred in applying an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C) because neither his 1996 Texas retaliation conviction nor his 1999 federal illegal-reentry conviction was a conviction for a qualifying "aggravated felony." See Appellant's Opening Br. 10-18. He also argued that this error was not harmless and required resentencing. See id. at 18-19.

In response, the government does not independently address the 1996 retaliation conviction at all. Nor has the government argued that any error was harmless. Instead, the government's sole argument is that the § 2L1.2(b)(1)(C) enhancement was properly applied on the basis of the 1999 illegal-reentry conviction. See Gov't Br. 7-10. For the reasons set out below, that contention is incorrect.

B. Mr. Mendoza Zamora's Federal Conviction for Illegal Reentry Has Not Been Shown to Be an "Aggravated Felony" Under 8 U.S.C. § 1101(a)(43)(O).

Seeking to bring this case within the holding of this Court's decision of United States v. Gamboa-Garcia, 620 F.3d 546 (5th Cir. 2010), the government argues that, as in that case, the record shows that Mr. Mendoza Zamora pleaded to, and hence was convicted of, a violation of 8 U.S.C. § 1326(b)(2). See Gov't Br. 8-10. The government is mistaken, and Gamboa-Garcia is distinguishable. In Gamboa-Garcia, the record showed that the defendant had actually pleaded guilty to – and hence had admitted – a § 1326(b)(2) offense. See Gamboa-Garcia, 620 F.3d at 549. The government assumes that the same is true in this case. See Gov't Br. 9 & n.3.

The government's assumption is not correct, and Mr. Mendoza Zamora has supplemented the record on appeal with various documents from the 1999 conviction to show why that is so. First off, the charging instrument in Mr. Mendoza Zamora's 1999 case (a criminal information) does not charge an antecedent "aggravated felony" conviction; rather, it charges only illegal reentry simpliciter under 8 U.S.C. § 1326.[1] Thus, contrary to the government's argument, Mr. Mendoza Zamora's plea to that information was ***not*** an admission to an antecedent "aggravated felony."

[1] Although the charge is followed by a statutory citation to 8 U.S.C. § 1326(a) and 1326(b)(2), the mere fact of a statutory citation, unaccompanied by a supporting allegation, is insufficient to charge a § 1326(b)(2) offense. See, e.g., United States v. Conley, 349 F.3d 837, 840 (5th Cir. 2003).

And, in fact, there is further evidence that Mr. Mendoza Zamora did not admit an antecedent "aggravated felony." Particularly, after his plea and in connection with his sentencing, Mr. Mendoza Zamora specifically challenged the characterization of his 1996 retaliation conviction as an "aggravated felony." See Defendant's Supplemental Objection to the Presentence Report, at 1-2; Defendant's Response to the Addendum to the Presentence Report and Motion for Downward Departure, at 3. There would have been no point in objecting at sentencing to an "aggravated felony" enhancement if Mr. Mendoza Zamora had already admitted to having an antecedent "aggravated felony" at his guilty plea.

Thus, unlike in Gamboa-Garcia, the evidence here shows that Mr. Mendoza Zamora did not, by pleading guilty in the 1999 case, admit to an antecedent "aggravated felony." The government has not carried its burden of showing, with evidence competent for the purpose under Shepard v. United States, 544 U.S. 13 (2005), that Mr. Mendoza Zamora was necessarily convicted of a § 1326(b)(2) offense in that prior case.[2] The 1999 illegal-reentry conviction is thus not a valid basis for the

[2] To the extent that the government appears to rely on the mention of § 1326(b)(2) in the prior judgment of conviction, that reliance is directly contrary to Shepard, which permits reliance on judicial findings only when they are assented to by the defendant. See Shepard, 544 U.S. at 16. As stated, there is no evidence that Mr. Mendoza Zamora ever assented to that finding, and there is plenty of evidence to the contrary. For this reason, too, the government's appeal to the principles of res judicata/collateral estoppel is misguided: unassented-to judicial findings do not become Shepard-approved evidence simply because the case in which they were made has become final.

§ 2L1.2(b)(1)(C) enhancement in this case.

C. This Court Should Vacate Mr. Mendoza Zamora's Sentence and Remand for Resentencing.

For the reasons stated in Mr. Mendoza Zamora's briefing, the 1999 illegal-reentry conviction is not a proper basis for the § 2L1.2(b)(1)(C) enhancement in this case. Additionally, the government has waived reliance on the 1996 retaliation conviction as an independent basis for the enhancement, by failing to brief that issue at all.[3] Cf. United States v. Luciano-Rodriguez, 442 F.3d 320, 322 n.5 (5th Cir. 2006) (government argument, made only in a single bare assertion in a footnote in its brief, was waived by inadequate briefing). The government has also completely failed to brief – and thus has waived – any argument that the error in this case was harmless.[4] Cf. id. Accordingly, this Court should vacate Mr. Mendoza Zamora's sentence and remand for resentencing.

[3] In any event, such an argument would be without merit, for the reasons set out in Mr. Mendoza Zamora's opening brief, q.v. at 12-16.

[4] In any event, such an argument would be without merit, for the reasons set out in Mr. Mendoza Zamora's opening brief, q.v. at 18-19.

CONCLUSION

For the reasons set forth in Mr. Mendoza Zamora's briefs, this Court should vacate Mr. Mendoza Zamora's sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that today, February 4, 2013, the foregoing reply brief for appellant was served upon Assistant United States Attorneys Terri-Lei O'Malley and Renata A. Gowie, counsel for appellee, by notice of electronic filing with the Fifth Circuit CM/ECF system. A courtesy hard copy of this document will be hand-delivered to Ms. O'Malley and Ms. Gowie at the United States Attorney's Office, 1000 Louisiana Street, Suite 2300, Houston, Texas 77002.

s/ Timothy Crooks
TIMOTHY CROOKS

CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,042 words, excluding the parts of the reply brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect X5 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

3. This reply brief was filed electronically, in native Portable Document File (PDF) format, via the Fifth Circuit's CM/ECF system.

s/ Timothy Crooks
TIMOTHY CROOKS