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No. 25-5532

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PRISILIANO SOLIS-ROBLERO, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE OPINION

Before: SILER, MOORE, and BLOOMEKATZ, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. Prisiliano Solis-Roblero pleaded guilty to being found in the United States after he had been removed from the country, in violation of 8 U.S.C. § 1326(a). At sentencing, the district court determined that Solis-Roblero's offense commenced on October 24, 2021, for purposes of calculating his criminal-history score under the Sentencing Guidelines. Solis-Roblero appealed, arguing that this was error and his offense commenced on February 5, 2025. Because the district court did not err in finding that Solis-Roblero's offense commenced on October 24, 2021, under the Guidelines, we **AFFIRM**.

I. BACKGROUND

Solis-Roblero was indicted for being found in the United States after he had been removed from the country, which violated 8 U.S.C. § 1326(a). R. 4 (Indictment) (Page ID #7). Solis-Roblero had been removed from the United States in 2003, 2004, 2013, 2015, and 2018. *Id.* He pleaded guilty to the charged offense and admitted that Immigration and Customs Enforcement

("ICE") "determined that [he] was unlawfully present in the United States" on February 5, 2025, that he was a noncitizen, and "that he re-entered the United States following his previous deportations." R. 16 (Plea Agreement at 1–2) (Page ID #25–26). At his change of plea hearing, Solis-Roblero confirmed that information was accurate. R. 40 (Plea Hr'g Tr. at 16) (Page ID #179).

Evidence gathered in preparation for Solis-Roblero's sentencing demonstrated that he had been in the United States since at least October 24, 2021. Solis-Roblero had been employed in Tennessee for the approximately four years prior to February 2025. R. 26 (Presentence Report ("PSR") ¶ 62) (Page ID #96). Additionally, Solis-Roblero was convicted of a domestic assault that occurred in Tennessee on October 24, 2021, and for driving under the influence, driving without a license, and failure to yield to an emergency vehicle in Georgia on July 14, 2024. *Id.* ¶¶ 42–43 (Page ID #93–94). Solis-Roblero did not object to any of this factual information, which was contained in the presentencing report. R. 41 (Sent'g Tr. at 5–8) (Page ID #188–91).

Because Solis-Roblero had been removed from the United States in 2018 and the earliest evidence of his presence in the country following that removal was his October 24, 2021, domestic assault, Probation concluded that Solis-Roblero's found-in offense "commenced on October 24, 2021, and concluded on February 5, 2025," when ICE determined that he was unlawfully present in the country. *Id.* ¶ 26 (Page ID #88). Solis-Roblero objected to that conclusion and argued that his offense commenced on February 5, 2025, when he was identified by ICE. R. 29 (Objections to PSR at 1) (Page ID #105). Whether Solis-Roblero's offense commenced on October 24, 2021, or February 5, 2025, matters for calculating his criminal-history score because under the United States Sentencing Guidelines Manual § 4A1.2(e)(2) (U.S. Sent'g Comm'n 2024), the "[a]pplicable [t]ime [p]eriod" for incurring points for prior offenses includes "prior sentence[s] that w[ere]

imposed within ten years of the defendant's commencement of the instant offense." Solis-Roblero had three prior convictions that fell within ten years of October 24, 2021, but fell outside ten years of February 5, 2025. R. 26 (PSR ¶¶ 36–38) (Page ID #90–91). With those convictions included, Solis-Roblero's criminal-history category was VI and his Guidelines range was 24–30 months' imprisonment. *Id.* ¶¶ 46, 68 (Page ID #94, 97). Without those convictions, his criminal-history category would have been V and his Guidelines range would have been 21–24 months' imprisonment. R. 41 (Sent'g Tr. at 11) (Page ID #194); Appellant Br. at 7. The statutory maximum for this offense, however, is 24 months' imprisonment. 8 U.S.C. § 1326(a); R. 41 (Sent'g Tr. at 12) (Page ID #195).

In Solis-Roblero's objections to the PSR and at sentencing, in addition to arguing that his "instant offense" "commenc[ed]" on February 5, 2025, he argued that the district court could not defer to the Guidelines commentary because "commencement of the instant offense" is unambiguous. R. 29 (Objections to PSR at 2–7) (Page ID #106–11); R. 41 (Sent'g Tr. at 6–8) (Page ID #189–91). The pertinent commentary allows courts to consider relevant conduct to determine when the offense commenced. U.S.S.G. § 4A1.2 cmt. n.8. The Government countered that because Solis-Roblero was present in the United States beginning on October 24, 2021, that date is when his offense commenced regardless of whether the district court could defer to the commentary and consider relevant conduct. R. 41 (Sent'g Tr. at 11–13) (Page ID #194–96). At sentencing, the district court asked if there was any indication that Solis-Roblero had left the United States after October 24, 2021, and then subsequently returned. *Id.* at 13–14 (Page ID #196–97). The Government said there was not, and Solis-Roblero's counsel did not object to that assertion or argue otherwise. *Id.* at 13–16 (Page ID #196–99).

Ultimately, the district court determined that it was not necessary to decide the legal question of whether relevant conduct may be considered under the Guidelines commentary in order to decide the factual question of when Solis-Roblero's found-in offense commenced. *Id.* at 16–18 (Page ID #199–201). Because it determined that Solis-Roblero was present in the country on October 24, 2021, and did not subsequently leave the country and return, the district court concluded that that is when his instant offense commenced. *Id.* The court sentenced Solis-Roblero to 24 months' imprisonment. *Id.* at 24 (Page ID #207).

II. ANALYSIS

We review for clear error a district court's factual findings and review de novo questions of law and mixed questions of law and fact. *United States v. Nicolescu*, 17 F.4th 706, 721–22 (6th Cir. 2021). Following *Kisor v. Wilkie*, 588 U.S. 558 (2019), we do not defer to the Guidelines commentary unless a Guideline is "genuinely ambiguous." *United States v. Riccardi*, 989 F.3d 476, 486 (6th Cir. 2021) (quoting *Kisor*, 588 U.S. at 574). Solis-Roblero argues that "commencement of the instant offense" is not ambiguous and means "the first culpable act taken by a defendant that comprises an element of the [8 U.S.C. § 1326(a) found-in] offense." Appellant Br. at 27 (citing *United States v. Josey*, 155 F.4th 234 (3d Cir. 2025)). We assume arguendo that Solis-Roblero is correct because, even accepting his argument, the district court did not err in finding that Solis-Roblero's offense commenced on October 24, 2021.

* * *

"Section 1326(a) contains three separate offenses, phrased in the disjunctive: (1) illegal re-entry, (2) attempted illegal reentry, and (3) being found illegally in the United States." *United States v. Hernandez-Gonzalez*, 495 F.3d 55, 58 (3d Cir. 2007) (quoting *United States v. Lennon,*

372 F.3d 535, 537 (3d Cir. 2004)). Solis-Roblero pleaded guilty to the third offense—being found in the United States. The elements of that offense are: "(1) the defendant is a[] [noncitizen]; (2) the defendant has been arrested and deported from the United States; and (3) thereafter, the defendant was found in the United States without the Attorney General's express consent to reapply for admission." *United States v. Villafana-Vivero*, 81 F. App'x 573, 578 (6th Cir. 2003); *see United States v. Henry*, 111 F.3d 111, 113 (11th Cir. 1997).[1]

A noncitizen is "found" when federal immigration authorities discover and identify them as unlawfully present in the country after a prior removal. *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1061–62 (9th Cir. 2000); *United States v. Castrillon-Gonzalez*, 77 F.3d 403, 406 (11th Cir. 1996). Being "found," in and of itself, requires no conduct by the defendant—federal immigration authorities are the ones who do the discovery and identification. *United States v. Ayon-Brito*, 981 F.3d 265, 270 (4th Cir. 2020). But to impose criminal liability there must be proof that the defendant engaged in a culpable act, which is often called the conduct element. *See United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur."); *United States v. $11,500.00 in United States Currency*, 869 F.3d 1062, 1071–74 (9th Cir. 2017); *United States v. Zhen Zhou Wu*, 711 F.3d 1, 18 (1st Cir. 2013). Thus, we must determine what the culpable conduct is for the

[1]Some of our sibling circuits have crafted a four-element test for this offense: "(1) that the defendant is a[] [noncitizen]; (2) that he was deported or removed from the United States; (3) that he thereafter reentered . . . the United States; and (4) that he lacked permission to do so." *United States v. Ayon-Brito*, 981 F.3d 265, 269 (4th Cir. 2020). "Under this formulation, the 'found' term in the statute is not employed to define an element," because "the 'reentry' element of the crime is established whenever the alien is found, '*wherever he is.* . . . The crime is *being* in the United States.'" *Id.* (quoting *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006)); *see United States v. Alvarez-Ulloa*, 784 F.3d 558, 570–71 (9th Cir. 2015); *United States v. Are*, 498 F.3d 460, 466 (7th Cir. 2007); *United States v. Amezquito Acevedo*, 229 F.3d 350, 355 (2d Cir. 2000); *United States v. Ayala*, 35 F.3d 423, 425–26 (9th Cir. 1994). The different formulation is virtually identical to our three-element test because, as explained below, our formulation embeds physical presence in the United States into "the found" element.

§ 1326(a) found-in offense. For our purposes, it suffices to say that the conduct element is the defendant's unlawful and volitional physical presence in the United States after their prior removal, which results from their surreptitious reentry.[2] *Ayon-Brito*, 981 F.3d at 270; *United States v. Are*, 498 F.3d 460, 464–66 (7th Cir. 2007); *United States v. Amezquito Acevedo*, 229 F.3d 350, 355 (2d Cir. 2000); *United States v. Diaz-Diaz*, 135 F.3d 572, 576 (8th Cir. 1998); *United States v. Ayala*, 35 F.3d 423, 425–26 (9th Cir. 1994). "To put it another way, it is apodictic that [a noncitizen] cannot have been found in a place" he is not physically present, which requires entry. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000). Therefore, even though the third element of the offense is being "found in" the United States, inherent within that element is the requirement that the defendant be physically present in the country. And the defendant engages in that conduct every day that they are unlawfully physically present in the country after their removal.

Under this understanding, the found-in offense is a continuing offense that begins when the noncitizen is first physically present in the United States and is completed when federal immigration authorities identify and discover them. *Cf. United States v. Murillo-Monzon*, 240 F. App'x 43, 49 (6th Cir. 2007) ("The crime is *being* in the United States and is not limited to the instant at which a federal agent lays hands on the person and a light bulb in the agent's head illuminates the mental sign 'This guy's an illegal alien.'" (quoting *United States v. Rodriguez-*

[2]Physical presence in the United States following a prior removal and reentry are, in many ways, different sides of the same coin. One cannot be physically present in the country following a removal without reentering it and one is physically present in the country as soon as one reenters it. To the extent that there is daylight between these two acts, we need not address whether the reentry itself, as opposed to the physical presence that results from the reentry, is the first culpable act of this offense because here there is no evidence of when Solis-Roblero reentered the United States after his 2018 removal. Therefore, it does not matter for our analysis whether the first culpable act is reentry or the physical presence that directly follows from that reentry.

Rodriguez, 453 F.3d 458, 460 (7th Cir. 2006))). If the found-in offense were not continuing in nature, it "would present the anomalous situation of the [noncitizen] committing the act of illegal entry, but then being free of criminal liability until he or she . . . [is] found in the country illegally." *Hernandez-Gonzalez*, 495 F.3d at 60; *see also United States v. Lopez-Flores*, 275 F.3d 661, 663 (7th Cir. 2001) ("It would be passing odd to say that Lopez had violated the statute when he entered but then was free of further criminal culpability until he was discovered by the INS.").[3]

This makes good sense because Congress added the found-in offense to § 1326(a) to address surreptitious reentries, which "immigration officials are unlikely to know about" because "[o]nly the [noncitizen] knows the precise date of [their] surreptitious entry," by "alleviat[ing] the difficult[y]" inherent in "finding and prosecuting" noncitizens who enter surreptitiously "before the five year statute of limitations runs." *United States v. DiSantillo*, 615 F.2d 128, 135 (3d Cir. 1980). And this interpretation does not render "found in" or "enters" superfluous. The found-in offense requires physical presence following a surreptitious reentry while "enters" addresses entry through regular immigration procedures. *Castrillon-Gonzalez*, 77 F.3d at 405; *DiSantillo*, 615 F.2d at 134–35; *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); *United States v. Rodriguez*, 26 F.3d 4, 8 (1st Cir. 1994); *United States v. Whittaker*, 999 F.2d 38, 42 (2d Cir. 1993).

[3]Solis-Roblero contends that the Government forfeited the argument that this is a continuing offense by not raising it before the district court. Reply Br. at 6 n.1. At sentencing, the Government argued that Solis-Roblero's offense commenced in October 2021 because he was unlawfully present in the United States at that time. R. 41 (Sent'g Tr. at 11–12) (Page ID #194–95). True, the Government did not use the phrase "continuing offense," but its argument that the offense commenced in 2021 implies as much. The Government therefore made its theory sufficiently clear, or, at the very least, raised "related or supporting arguments," so the issue is not forfeited. *Smith v. City of Union*, 144 F.4th 867, 878 (6th Cir. 2025).

For these reasons, every court of appeals to address the question has held, in a variety of contexts, that the offense of being found in the United States commences when the noncitizen surreptitiously reenters, or is physically present in the United States following that reentry, and is completed when federal immigration authorities identify the defendant.[4] *See Ayon-Brito*, 981 F.3d at 269–71; *Lopez-Flores*, 275 F.3d at 663; *Castrillon-Gonzalez*, 77 F.3d at 406; *Ruelas-Arreguin*, 219 F.3d at 1061; *United States v. Hernandez-Guerrero*, 633 F.3d 933, 937–38 (9th Cir. 2011); *United States v. Ruiz-Gea*, 340 F.3d 1181, 1189 (10th Cir. 2003); *United States v. Reyes-Nava*, 169 F.3d 278, 280 (5th Cir. 1999); *United States v. Gomez*, 38 F.3d 1031, 1034–35 (8th Cir. 1994); *United States v. Escobedo-Torres*, 146 F. App'x 736, 742 (5th Cir. 2005).[5]

In sum, the crime of being found in the United States is a continuing offense that commences when a defendant is first physically present in the country after their prior removal. Here, we know that Solis-Roblero was physically present in the United States on October 24, 2021. There is no evidence that he left the country and returned after that date. Therefore, the district court did not err in finding that Solis-Roblero's offense commenced in 2021 when he committed "the first culpable act comprising" the offense of conviction. *Josey*, 155 F.4th at 243.

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[4]The Second Circuit's conclusion that being found in the United States is not a continuing offense once federal immigration authorities discover the noncitizen's unlawful presence is not to the contrary. *United States v. Rivera-Ventura*, 72 F.3d 277, 279–82 (2d Cir. 1995). As the Second Circuit explained, "[t]o the extent that § 1326(a) makes it a crime to be 'found in' the United States, that provision is the practical equivalent of making unlawful 'entry' a continuing offense until at least such time as the [noncitizen] is located." *Id.* at 282. The Second Circuit held only that "being 'found' itself" should not "be treated as a continuing offense so that a[] [noncitizen] whom the authorities have once taken into custody with knowledge of the illegality of his presence may be repeatedly deemed to have been 'found' at some later time or times." *Id.* There is no evidence that authorities were aware of Solis-Roblero's unlawful presence before February 5, 2025, so this holding is not contrary to our conclusion.

[5]We have assumed without deciding that being found in the United States "is a continuing offense, deemed to have commenced on the date of illegal re-entry and continuing to the date of arrest for the offense." *United States v. Jimenez*, 605 F.3d 415, 422 (6th Cir. 2010), *abrogated on other grounds by Tapia v. United States*, 564 U.S. 319 (2011). The parties agree that because we did not actually decide the issue, *Jimenez* is not binding. *See* Appellant Br. at 19 n.5; Appellee Br. at 10 n.1.

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Solis-Roblero presents several arguments against this conclusion, but none persuade. First, Solis-Roblero contends that in *United States v. Cores*, 356 U.S. 405, 408 n.6 (1958), the Supreme Court held that § 1326 was not a continuing offense. D. 37 (Additional Citation at 1). But *Cores* addressed the entry versions of the offense—it did not discuss the found-in version. 356 U.S. at 408 n.6 ("The offense here is unlike crimes of illegal entry . . . . Those offenses are not continuing ones, as 'entry' is limited to a particular locality and hardly suggests continuity."). And Solis-Roblero's reliance on *Abouammo v. United States*, 608 U.S.----, 146 S. Ct. 1571, 1575–77 (2026), fares no better because the Court held only that "a defendant charged with violating [18 U.S.C.] § 1519 must be tried in the district where the falsification occurred" because that is the "crime's conduct element" and defendants must be tried where the crime's conduct element occurred. It therefore does not disprove that § 1326 is a continuing offense.

Next, Solis-Roblero argues that because the length of his physical presence in the United States is not an element of the offense, it is irrelevant that he had been in the country since October 24, 2021. All that matters, the argument goes, is that federal immigration officials found him on February 5, 2025. Appellant Br. at 19–21. But Solis-Roblero's argument overlooks the fundamental point: that physical presence in the country is the conduct element of the offense, meaning that Solis-Roblero's offense commenced when he first engaged in that culpable conduct, not on the day that he was found. Just because the Government need not prove that Solis-Roblero was in the United States for a certain period does not mean that his physical presence in the country is irrelevant to when he commenced his offense. The only reason that Solis-Roblero was not charged with the offense in October 2021 is that federal immigration authorities had not yet found

him. If the authorities had found Solis-Roblero on October 24, 2021, he could have been charged with the exact same crime then and there—no further conduct by Solis-Roblero was needed to complete the offense.

Solis-Roblero also relies on cases holding that the found-in offense is completed when federal immigration authorities identify the defendant to argue that the district court looked beyond the elements of the offense. Appellant Br. at 18–21. But Solis-Roblero's reliance on cases discussing when the offense is completed, rather than when it commences, ignores that U.S.S.G. § 4A1.2(e)(2) looks to the "commencement of the instant offense." "The distinction between completion and commencement is critical" because "§ 4A1.2(e)(2) counts any sentence imposed 'within ten years of the defendant's *commencement* of the instant offense,'" not the *completion* of the instant offense. *Castrillon-Gonzalez*, 77 F.3d at 406 (quoting U.S.S.G. § 4A1.2(e)(2)). Therefore, this does not tip the scales in Solis-Roblero's favor.

Solis-Roblero finally argues that, because his indictment and plea agreement do not include the date October 24, 2021, the district court necessarily considered relevant conduct when it looked to that date. Reply Br. at 4–6. If his earlier physical presence was an element of the offense, the argument goes, then the first date that he was present in the country needed to be included in the indictment and plea. But Solis-Roblero admitted to illegally reentering the United States in the factual basis of his plea, which, of course, directly led to his physical presence in the country. R. 16 (Plea Agreement at 2) (Page ID #26). The mere fact that the exact date of this reentry and resulting physical presence was not included in the indictment and plea agreement does not mean that the district court looked to relevant conduct to determine when Solis-Roblero's continuing offense initially commenced. Instead, the district court looked at the evidence presented at

sentencing, to which Solis-Roblero did not object, to determine when Solis-Roblero began the culpable conduct that he admitted he had engaged in as part of his offense of conviction. Additionally, in most circumstances "an indictment under § 1326(a) need not specifically denote the duration of a defendant's illegal presence" or "mention the actual reentry because that concept is 'embedded in the "found in" offense,' as must be, by extension, the time spent in the United States between when one reenters and is found." *United States v. Alvarez-Ulloa*, 784 F.3d 558, 571 (9th Cir. 2015) (quoting *Pacheco-Medina*, 212 F.3d at 1166).

If there were any indication that Solis-Roblero had exited the United States after October 24, 2021, and later returned, then the commencement date would be different. In that scenario, Solis-Roblero's offense of conviction would have commenced with his subsequent reentry and physical presence, not with his physical presence on October 24. *See Ruelas-Arreguin*, 219 F.3d at 1061–62. But there is no such evidence, and Solis-Roblero does not contend that he left the country after October 2021 and subsequently returned. Therefore, irrespective of the fact that the indictment and plea agreement do not specify October 24, 2021, the district court did not err.

III. CONCLUSION

The crime of being found in the United States is a continuing offense that commences when a defendant is first physically present in the country as a result of their surreptitious reentry after removal and is completed when they are discovered and identified by federal immigration authorities. Therefore, the district court did not err in finding that Solis-Roblero's offense commenced on October 24, 2021, when evidence shows that he was first present in the country after he was removed in 2018. We **AFFIRM**.