

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JEROME ARISTEDES MARTINEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), the Supreme Court made it clear, in dicta, that attempted illegal reentry is a specific intent crime. However, in Mr. Martinez' case, the Fifth Circuit failed to follow *Resendiz-Ponce*, holding instead, that attempted illegal reentry is a general intent crime, while the Ninth Circuit has held that attempted illegal reentry requires specific intent to commit the crime. This Court should resolve the circuit split and answer the question of whether attempted illegal reentry is a specific intent crime or a general intent crime.

LIST OF PARTIES

JEROME ARISTEDES MARTINEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Jerome Aristedes Martinez, Petitioner.
2. Roberto Balli, Counsel for Petitioner.
3. United States of America, Respondent.
4. Carmen Castillo Mitchell, Counsel for Respondent.
5. The Honorable Noel J. Francisco, Jr., Office of the Solicitor General of the United States.

ROBERTO BALLI

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OPINIONS BELOW

A copy of the Fifth Circuit's unpublished opinion issued in this case on April 4, 2018, is attached as Appendix A. A copy the District Court's judgment is attached as Appendix B. The district court did not issue a written opinion.

JURISDICTION

The jurisdiction of this Court to review the Judgment of the Fifth Circuit is invoked in 28 U.S.C. § 1254(1), as an appeal from final judgment of conviction in the United States Court of Appeals for the Fifth Circuit on April 4, 2018. Pursuant to Supreme Court Rule 10(a) United States Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 8 United States Code § 1326 provides:

§ 1326. Reentry of removed aliens

(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.

8 U.S.C.A. § 1326 (West)

STATEMENT OF THE CASE

On September 15, 2015, Jerome Aristedes Martinez was charged by indictment with one count of attempted illegal entry after deportation, in violation of Title 8 U.S.C. § 1326. ROA.40. On January 17, 2017, Jerome Aristedes Martinez pleaded not guilty and proceeded to trial. ROA.737-1099. The first trial ended in a mistrial.

On February 14, 2017, the case was retried to a jury. ROA.1330-1687. At the second trial, the evidence showed that on August 18, 2015, Mr. Martinez arrived at the port of entry in Laredo, in a passenger bus. ROA.1388-90. As proof of citizenship, Mr. Martinez presented an e-verify document, his voter identification card, and an Illinois driver's license to an immigration inspector. ROA.1390. There was evidence presented at trial that the Social Security Administration had a record on file that Mr. Martinez is a U.S. citizen. ROA.1499, 1506. Mr. Martinez testified that he was born in the U.S. Virgin Islands. ROA.1499, 1506. Mr. Martinez presented his e-verify document, his voter identification card, and his

Illinois driver's license at the port of entry. ROA.1532-33. Mr. Martinez testified that he planned on presenting these documents to the inspectors; if they did not admit him into the country, he would turn back. ROA.1535. However, Mr. Martinez was never admitted into the country. The Government provided evidence that Martinez had been previously deported. ROA.1414-76.

Mr. Martinez's counsel requested that the Court instruct the jury using the Ninth Circuit instruction on attempted illegal reentry instead of the Fifth Circuit's instruction. ROA.262-63, 1524-25. The Court denied the request and used the Fifth Circuit's pattern instruction. ROA.435-45, 1524-25, 1668-80. The primary difference between the two instructions is that the Ninth Circuit instruction requested by the Defense and denied by the district court requires specific intent to commit the crime. On the contrary, the Fifth Circuit instruction given to the jury does not require specific intent to commit the crime. Because the court denied the request, the only issue before the jury was Mr. Martinez's citizenship. The jury trial ended in a guilty verdict. ROA.446-47. On June 5, 2017, the district court sentenced Martinez to 33 months of imprisonment, one year of supervised release, and a \$100.00 special assessment. ROA.1705. The Fifth Circuit affirmed the district court *United States v. Martinez*, 717 F. App'x 498 (5th Cir. 2018) holding the attempted illegal reentry is general intent crime.

REASONS FOR GRANTING THE PETITION

I. IN *UNITED STATES V. RESENDIZ-PONCE*, 549 U.S. 102 (2007), THE SUPREME COURT MADE IT CLEAR, IN DICTA, THAT ATTEMPTED ILLEGAL REENTRY IS A SPECIFIC INTENT CRIME. HOWEVER, IN MR. MARTINEZ' CASE, THE FIFTH CIRCUIT FAILED TO FOLLOW *RESENDIZ-PONCE*, HOLDING THAT ATTEMPTED ILLEGAL REENTRY IS GENERAL INTENT CRIME, WHILE THE NINTH CIRCUIT HAS HELD THAT ATTEMPTED ILLEGAL REENTRY REQUIRES SPECIFIC INTENT TO COMMIT THE CRIME. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT AND ANSWER THE QUESTION OF WHETHER ILLEGAL REENTRY IS SPECIFIC INTENT CRIME OR A GENERAL INTENT CRIME.

A. Review Is Warranted Because the Circuit Split Between the Fifth Circuit and the Ninth Circuit Regarding Whether Attempted Illegal Reentry is a General Intent Crime or a Specific Intent Crime Should be Resolved by this Court.

The attempted reentry statute does not specify a mental state. However, the “mere omission from a criminal enactment of any mention of criminal intent” should not be read “as dispensing with it.” *Morissette v. United States*, 342 U.S. 246, 250, (1952); *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015). The question presented here by Mr. Martinez is whether attempted illegal re-entry is a specific intent crime or a general intent crime. The basic principle is that “wrongdoing must be conscious to be criminal.” *Id.*

B. Supreme Court Dicta - Attempted Reentry is Specific Intent Crime

In *United States v. Resendiz-Ponce*, the Supreme Court considered the required elements needed to be charged in an indictment for attempted illegal reentry. 549 U.S. 102 (2007). In its analysis, the Court states that, “at common law,” attempt requires proof that the accused committed an overt act and “intended to commit the completed offense.” *Id.* at 106. Although this language is dicta, this Court is clearly referring to illegal re-entry as a specific intent crime since the Court

states that the defendant must intend to commit the completed offense of illegal reentry. This is consistent with the Ninth Circuit's rule that illegal reentry is specific intent crime. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000); *United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016).

Since *Resendiz-Ponce* was decided by the Supreme Court, the Fifth Circuit had not considered the issue of whether attempted illegal reentry is specific intent crime until it considered Mr. Martinez's case. The Fifth Circuit declined to follow the dicta in *Resendiz-Ponce* or the Ninth Circuit. *United States v. Martinez*, 717 Fed.Appx. 498, 499 (5th Cir. 2018). Instead, the Fifth Circuit followed its own precedent *United States v. Morales-Palacios*, 369 F.3d 442 (5th Cir. 2004), which holds that the crime of attempted illegal reentry into the United States is a general intent offense. *United States v. Martinez*, 717 Fed.Appx. 498, 499 (5th Cir. 2018).

C. Ninth Circuit - Attempted Illegal Reentry is a Specific Intent Crime.

The Ninth Circuit holds that attempted illegal reentry is a specific intent offense. See *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000); *United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016).

The Ninth Circuit jury instructions requested by Martinez's counsel at trial are consistent with *Gracidas-Ulibarry* and *Argueta-Rosales* as follows:

First, the defendant was removed from the United States.

Second, the defendant had the conscious desire to reenter the United States without consent;

Third, the defendant was an alien at the time of the defendant's attempted reentry into the United States;

Fourth, the defendant had not obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant did something that was a substantial step toward committing the crime.

ROA.262.

The principal difference between the instruction given and the requested instruction is that the Ninth Circuit instruction requested by the Defense requires the “conscious desire to reenter the United States without consent.” It is this element that makes the Ninth Circuit charge a specific intent crime.

D. Circuits Holding Attempted Illegal Reentry is a General Intent Crime

In Mr. Martinez’ case, the Fifth Circuit followed its precedent *United States v. Morales-Palacios*, 369 F.3d 442, 446-48 (5th Cir. 2004), holding that illegal reentry is a general intent crime. The Fifth Circuit is not alone in holding that attempted illegal reentry is a general intent crime, three other circuits have done so. See *United States v. Peralta-Reyes*, 131 F.3d 956 (11th Cir. 1997) (*per curiam*); *United States v. Reyes-Medina*, 53 F.3d 327 (1st Cir. 1995) (*per curiam*), *United States v. Rodriguez*, 416 F.3d 123 (2d Cir. 2005).

E. Relief Sought

The Court should grant this Writ and order briefing to consider Supreme Court’s analysis in *Resendiz-Ponce* and its application in settling the circuit split between the Fifth Circuit and Ninth Circuit regarding whether the attempted reentry is a specific intent crime or a general intent crime.

Petitioner ultimately seeks for this Court to ultimately reverse the Fifth Circuit in this case, overruling Fifth Circuit precedent in *United States v. Morales-Palacios*, 369 F.3d 442 (5th Cir. 2004); *United States v. Flores-Martinez*, 677 F.3d 699 (5th Cir. 2012); and *United States v. Jara-Favela*, 686 F.3d 289, 302 (5th Cir. 2012), which hold that attempted illegal reentry is a general intent crime. The Ninth Circuit's specific intent instruction would have made a difference because in his trials, Mr. Martinez presented evidence of citizenship at the port of entry and testified that it was his intent to return if he was denied admission into the country. ROA.923, 1535. Petitioner ultimately requests that this Court hold that Illegal Reentry of a Deported Alien is a specific intent crime, following the Ninth Circuit in *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000); and *United States v. Argueta Rosales*, 819 F.3d 1149 (9th Cir. 2016).

CONCLUSION

The Court should grant this Writ and order briefing to consider Supreme Court's analysis in *Resendiz-Ponce* and its application in settling the circuit split between the Fifth Circuit and Ninth Circuit and regarding whether the attempted reentry is a specific intent crime or a general intent crime.

Date: June 25, 2018.

Respectfully submitted,

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