No. 18-5036

IN THE SUPREME COURT OF THE UNITED STATES

JEROME ARISTEDES MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in order to convict petitioner of attempted reentry into the United States after removal, in violation of 8 U.S.C. 1326, the government was required to prove that petitioner had the specific intent to violate the immigration laws.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 717 Fed. Appx. 498.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2018. A petition for a writ of certiorari was filed on June 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of attempting to illegally reenter the United States after having been deported or removed, in violation of 8 U.S.C. 1326. The district court sentenced petitioner to 33 months of imprisonment, to be followed by one year of supervised release. Gov't C.A. Br. 3. The court of appeals affirmed, but remanded for the limited purpose of correcting a clerical error in the judgment. Pet. App. A1-A3.

1. Petitioner is a citizen of Belize. Gov't C.A. Br. 4. At a young age, he entered the United States unlawfully and settled in Chicago, Illinois. Ibid. Thereafter, petitioner accumulated a lengthy criminal record. See id. at 4 & n.2. On June 25, 1996, an immigration judge ordered petitioner deported from the United States, and he was deported to Belize. Id. at 4; see R.O.A. 1425-1428.[1]

In 1997, petitioner returned to the United States illegally. Gov't C.A. Br. 4. In 2010, petitioner pleaded guilty to illegally

[1] At the time, the Immigration and Nationality Act, 8 U.S.C. 1101 et seq., drew a distinction between exclusion proceedings (for aliens seeking to enter) and deportation proceedings (for those who had already entered). See Vartelas v. Holder, 566 U.S. 257, 261 (2012). Congress later abolished that distinction "and created a uniform proceeding known as 'removal.'" Id. at 262. The distinction is immaterial under statute at issue here, however, because it prohibits unlawful reentry after an alien has been "excluded, deported, or removed." 8 U.S.C. 1325(a)(1).

reentering the United States, in violation of 8 U.S.C. 1326, and admitted in his plea that he was born in Belize. Gov't C.A. Br. 7. In 2013, petitioner was removed to Belize. Id. at 4-5.

On August 18, 2015, petitioner was a passenger on a commercial bus and presented himself at the port of entry in Laredo, Texas. Gov't C.A. Br. 5. He provided the inspection officer with an Illinois identification card and an "e-verify" employment eligibility document from the Department of Homeland Security that described him as a United States citizen. Ibid. Petitioner told the officer that he was a United States citizen returning to his home in Chicago after sightseeing in Mexico. Ibid. The e-verify document was insufficient as a second form of identification to enter this country. Ibid. The officer discovered through an immigration check that petitioner previously had been deported. Ibid. The officer detained petitioner and sent him to secondary inspection, where his immigration history was confirmed. Petitioner had not sought permission to reenter the United States. Id. at 5-6.

2. A federal grand jury in Southern District of Texas returned a one-count indictment charging petitioner with violating 8 U.S.C. 1326 by attempting to enter the United States after having been deported or removed, without having obtained the consent of the Attorney General or the Secretary of Homeland Security to reapply for admission. Indictment 1. Petitioner's first jury

trial ended in a mistrial. Petitioner was retried, and the jury found petitioner guilty. Gov't C.A. Br. 3.

a. At trial, petitioner testified that he returned to the United States because he "found out" he was a United States citizen after obtaining his school records from Illinois that stated that he had been born in the U.S. Virgin Islands. 2/14/17 Tr. 201.[2] He further testified that his wife ran his name through the e-verify system, which he claimed also showed his United States citizenship. Gov't C.A. Br. 6-7. Petitioner testified that he showed his school records and e-verify form, along with an Illinois voter registration card and identification card, to the officers at the port of entry and that he intended to enter the country as a U.S. citizen. Id. at 7.

Petitioner admitted, however, to signing an immigration form in 1988 (when he was 18) seeking an adjustment of status, in which he certified under penalty of perjury that he had originally entered the United States unlawfully. That same document stated he, along with his mother and siblings, were born in or citizens of Belize. 2/14/17 Tr. 207-208. Petitioner admitted to being deported to Belize in 1996 and nonetheless returning to the United States in 1997. Id. at 199-200, 209. He admitted that he had previously pleaded guilty to illegal reentry and to having admitted

[2] The evidence also showed that, in 1980, petitioner or someone acting on his behalf applied for a social security card in Chicago. The application form claimed that petitioner's place of birth was the U.S. Virgin Islands. Gov't C.A. Br. 6.

in his plea that he was born in Belize. Id. at 213-214. He admitted that, after allegedly learning of his U.S. citizenship, he never contacted any government agencies to obtain official information on how he should proceed. Ibid. The United States also presented testimony from the Director of the Office of Vital Records and Statistics from the Virgin Islands that no birth record exists for petitioner in the U.S. Virgin Islands corresponding to his claimed date of birth. Gov't C.A. Br. 7.

Petitioner requested that the district court instruct the jury that the offense elements required that "the defendant had the conscious desire to reenter the United States without consent." D. Ct. Doc. 125, at 1 (Jan. 25, 2017). The court denied the request. 2/14/17 Tr. 35-36. The court stated that it would charge the jury in accordance with circuit precedent, which holds that attempted illegal reentry requires proof only of general intent, not specific intent to violate the law. Ibid.; see United States v. Morales-Palacios, 369 F.3d 442, 447-449 (5th Cir.), cert. denied, 543 U.S. 825 (2004).

The district court instructed the jury that the government was required to prove beyond a reasonable doubt: (1) that petitioner was an alien; (2) that he had previously been deported or removed from the United States; (3) that thereafter he knowingly attempted to enter the United States; and (4) that he had not obtained the express permission of the Secretary of Homeland Security to apply for readmission. 2/15/17 Tr. 107. The court

explained that "[a]ttempted reentry into the United States means that the Defendant approached a port of entry and made a false claim of citizenship or non-resident alien status." Ibid. The jury found petitioner guilty. The court sentenced him to 33 months of imprisonment, to be followed by one year of supervised release. Gov't C.A. Br. 3.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. A1-A3. Relying on circuit precedent, the court explained that petitioner was not entitled to his requested jury instruction because "for an attempted illegal reentry under section 1326 specific intent is not an element of the statute." Id. at A2 (quoting Morales-Palacios, 369 F.3d at 449).

ARGUMENT

Petitioner contends (Pet. 5-7) that, in a prosecution under 8 U.S.C. 1326 for attempting to reenter the United States after deportation or removal without the express permission of the appropriate government official, the government is required prove that the defendant had the specific intent to commit a substantive Section 1326(a) offense. In petitioner's view, such a specific-intent element would require proof that the defendant "had the conscious desire to reenter the United States without consent," Pet. 6 (citation omitted), or, as petitioner has previously put it, "that the defendant had a specific intent to violate the immigration laws," Pet. C.A. Br. 9. This Court has repeatedly

denied review in other cases presenting similar claims. See Garcia v. United States, 556 U.S. 1106 (2009) (No. 08-7122); Rodriguez v. United States, 546 U.S. 1140 (2006) (No. 05-7011); Colin v. United States, 543 U.S. 1123 (2005) (No. 04-6945); Morales-Palacios v. United States, 543 U.S. 825 (2004) (No. 03-10114); Urbaez v. United States, 539 U.S. 929 (2003) (No. 02-8960); Campana-Jansen v. United States, 538 U.S. 1014 (2003) (No. 02-8785); Mendiola-Amador v. United States, 538 U.S. 1001 (2003) (No. 02-8642). Further review is likewise not warranted here.

1. The text of 8 U.S.C. 1326 provides no support for petitioner's claim. Section 1326(a) establishes criminal penalties for an 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 * * * 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.

8 U.S.C. 1326(a). Section 1326(a) thus bars any alien who has been deported or removed from later attempting to enter the United States without first receiving express consent from the Attorney General or the Secretary of Homeland Security official to reapply for admission.[3] Nothing in the text of the statute requires proof

[3] Under 6 U.S.C. 557, the reference to the Attorney General is deemed to include the Secretary of Homeland Security, who has assumed responsibility for carrying out immigration enforcement functions and establishing and administering rules governing

that the defendant knew that he needed and lacked such express consent.

2. Every court of appeals that has addressed the question has held that an alien's mistaken belief that he was entitled to reenter the United States is no defense to a substantive charge of illegal reentry after deportation under Section 1326. See United States v. Carlos-Colmenares, 253 F.3d 276, 277 (7th Cir.) (collecting cases), cert. denied, 534 U.S. 914 (2001). Petitioner argues, however, that a different rule should apply when a defendant is charged with attempted illegal reentry. Petitioner is incorrect.

Although specific intent is implicit in the common-law definition of "attempt," that definition has little force here because the unlawful-entry crimes defined by Section 1326 are statutory offenses that lack a common-law analogue. See United States v. Rodriguez, 416 F.3d 123, 126 (2d Cir. 2005), cert. denied, 546 U.S. 1140 (2006); United States v. Morales-Palacios, 369 F.3d 442, 449 (5th Cir.), cert. denied, 543 U.S. 825 (2004). In any event, it is by no means clear that reading a specific-intent element into Section 1326(a) would require the government to prove that the alien knew that he was not entitled to reenter

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permission to enter the United States for persons who are neither citizens nor lawful permanent residents. 6 U.S.C. 202(3) and (4) (2012 & Supp. IV 2016).

the United States or knew that he needed and lacked the consent of the Attorney General or the Secretary of Homeland Security.

To the contrary, this Court has suggested that the relevant element of a common-law "attempt" crime is a specific intent to commit the act that is unlawful, not a specific intent to act illegally. Braxton v. United States, 500 U.S. 344, 351 n.* (1991); see 2 Wayne R. LaFave, Substantive Criminal Law § 11.3(a), at 211-212 (2d ed. 2003). Thus, as the First Circuit has explained, the attempt offense under Section 1326 "is a specific intent crime in the sense that an 'attempt to enter' requires a subjective intent on the part of the defendant to achieve entry into the United States as well as a substantial step toward completing that entry." United States v. De León, 270 F.3d 90, 92 (2001) (citation omitted). But "there is no requirement that the defendant additionally know that what he proposes to do -- i.e., attempt to enter the United States -- is for him criminal conduct." Ibid.

Essentially, petitioner appears to ask the Court to recognize a mistake-of-law defense to a Section 1326(a) attempt charge -- i.e., to require the acquittal of any defendant who voluntarily and intentionally attempted to enter the United States but who mistakenly believed that he did not need, or that he had, the consent required to do so. The "general rule," however, is that "ignorance of the law or a mistake of law is no defense to criminal

prosecution," and that rule is "deeply rooted in the American legal system." Cheek v. United States, 498 U.S. 192, 199 (1991).[4]

The unlikelihood that innocent conduct might run afoul of Section 1326 further supports the court of appeals' construction of the statute. Persons potentially subject to prosecution under Section 1326 are aliens who have been denied admission into the United States, or have been ordered excluded, deported, or removed from the country. Those aliens may reasonably be expected to be aware of their ineligibility to reenter the United States without official authorization. See Morales-Palacios, 369 F.3d at 449 ("The process of deportation sufficiently placed [the defendant] on notice that he stood in reasonable relation to danger if he attempted to reenter the United States without government consent."); Carlos-Colmenares, 253 F.3d at 278 ("Deportation itself is sufficient to impress upon the mind of the deportee that return is forbidden.") (quoting United States v. Torres-

[4] To the extent that petitioner is arguing that he did not attempt to violate Section 1326 because, even if he knew that he was not a United States citizen, he intended to "turn back" if the border officials did not accept the identification documents he presented, Pet. 4, nothing supports the contention that such conduct falls outside an attempted illegal reentry offense. In that scenario, the pertinent question would not be whether attempted illegal reentry is a specific intent crime. Rather, it would be whether his efforts to trick border officials into allowing him entry into the United States by presentation of false or misleading documents is "a substantial step toward completion of his goal" sufficient to qualify as an "attempt," United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007), when the officials are not duped and deny him entry. Petitioner has made no argument that the jury instructions here failed to require proof of a substantial step toward completion of the offense.

Echavarria, 129 F.3d 692, 698 (2d Cir. 1997), cert. denied, 522 U.S. 1153 (1998)) (brackets omitted); cf. United States v. Freed, 401 U.S. 601, 609 (1971) (statute criminalizing possession of unregistered hand grenades, without requiring knowledge that grenades are unregistered, "may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act").

Petitioner's reliance (Pet. 5-6) on United States v. Resendiz-Ponce, 549 U.S. 102 (2007), is unavailing. That case concerned the sufficiency of an indictment for attempted illegal reentry that did not expressly allege a substantial step in furtherance of that offense. The Court held that an allegation that the defendant "attempted to enter the United States" was sufficient. Id. at 107. Petitioner cites (Pet. 5) the Court's statement that, "[a]t common law, the attempt to commit a crime was itself a crime if the perpetrator not only intended to commit the completed offense, but also performed * * * a 'substantial step' toward completing the offense." 549 U.S. at 106 (citation omitted). The contours of the mens rea element of the Section 1326 attempt offense were not directly at issue in Resendiz-Ponce, and regardless, the Court's reference to an intent "to commit the completed offense," ibid., does not equate to a specific intent to violate the immigration laws. This Court has denied a petition for certiorari in a case raising a claim similar to petitioner's

after Resendiz-Ponce was decided, see Garcia, 556 U.S. at 1106, and the same result is warranted here.

3. The court of appeals' decision in this case is consistent with the holdings of several other circuits. See Rodriguez, 416 F.3d at 125-128; De León, 270 F.3d at 92; United States v. Peralt-Reyes, 131 F.3d 956 (11th Cir. 1997) (per curiam), cert. denied, 523 U.S. 1087 (1998); see also United States v. Garcia, 288 Fed. Appx. 888, 889 (4th Cir. 2008) (per curiam), cert. denied, 556 U.S. 1106 (2009).

Petitioner argues (Pet. 6-7), however, that the Fifth Circuit's decision in this case conflicts with the Ninth Circuit's decision in United States v. Gracidas-Ulibarry, 231 F.3d 1188 (2000) (en banc). That case involved an alien who claimed that he was sleeping when he was driven to a border crossing-point, and that he therefore lacked a "conscious desire to enter the United States without first obtaining express consent." Id. at 1197. The Ninth Circuit held that one element of the Section 1326(a) attempt offense is that "the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General." Id. at 1196. The court affirmed the defendant's conviction, however, holding that the district court's failure to instruct the jury on the intent element of the offense was harmless in light of the overwhelming evidence that the defendant had acted with the requisite intent. Id. at 1197-1198.

Gracidas-Ulibarry involved a significantly different claim than does this case. There, the defendant admitted knowing that he needed permission to reenter the United States and that he had not sought such permission. See 231 F.3d at 1191, 1197. His defense was that he lacked the requisite intent to reenter the country because he was sleeping. While the Ninth Circuit's articulation of the elements of the Section 1326 attempt offense (see id. at 1196) supports petitioner's theory, the court in Gracidas-Ulibarry did not specifically address a situation in which the defendant asserts a mistaken belief in the lawfulness of his attempted reentry as a defense to a Section 1326 prosecution.

Petitioner also cites (Pet. 6) the Ninth Circuit's decision in United States v. Argueta-Rosales, 819 F.3d 1149 (9th Cir. 2016). In that case, the defendant "presented evidence that he crossed into the United States in a delusional state, believing he was being chased by Mexican gangs, and with the specific intent solely to place himself into the protective custody of United States officials." Id. at 1151. Relying on its prior statement that attempted illegal reentry "is a specific intent crime that requires proof of intent to enter the country free from official restraint," the court of appeals reversed on the view that the district court, in conducting a bench trial, had applied an incorrect legal standard in finding the defendant guilty. Ibid. (quoting United States v. Lombera-Valdovinos, 429 F.3d 927, 928 (9th Cir. 2005)). Argueta-Rosales is inapposite, however. Petitioner has not made

a claim like the one advanced by the defendant there -- namely, that he did not attempt to "enter" the United States where his ultimate goal was to be taken into official custody. Accordingly, Argueta-Rosales does not conflict with the court of appeals' unpublished decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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