No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

RENE GARCIA-MONTEJO, also known as Bibian Garcia-Montejo,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN 00792137
Attorney for Petitioner

Issue Presented

1. Whether the "official restraint" doctrine precludes the possibility that that a defendant can be illegally "found in" the United States, for purposes of Title 8 U.S.C. § 1326(a), if he was under constant surveillance by immigration authorities from the time he stepped onto U.S. soil until the time he was apprehended.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rene Garcia-Montejo ("Garcia") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming Garcia's conviction and sentence is styled: *United States v. Garcia-Montejo,* 736 F. App'x 94 (5th Cir. 2018).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the Petitioner's conviction and sentence was announced on August 31, 2018 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Federal Statute

8 U.S.C. § 1326(a)

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.

Statement of the Case

Garcia pled guilty to "having been *found in* Cameron County, Texas," in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(1). The district court sentenced him to 46 months in prison, three years of supervised release, and no fine. The jurisdiction of the federal district court was invoked pursuant to Title 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.").

The facts of the case are simple. Border Patrol authorities watched Garcia climb out of the Rio Grande River and then apprehended him.

Garcia argued on appeal that his guilty plea was not knowing and voluntary, given that that the record, on its face, showed that he was "officially restrained" from the time he crossed the border until the time he was intercepted, and therefore could not possibly be legally "found in" the United States. More specifically, Garcia argued as follows.

A § 1326 "found in" offense requires "entry"

Section 1326 sets forth three separate offenses for a deported alien: to "enter," to "attempt to enter," and to be "found in" the United States

without permission. 8 U.S.C. § 1326(a); *United States v. Santana-Castellano,* 74 F.3d 593, 597 (5th Cir. 1996); *United States v. Angeles-Mascote,* 206 F.3d 529, 531 (5th Cir. 2000). Garcia was alleged to have been "found in." For a defendant to be convicted under the "found in" prong of § 1326, there must be evidence that he "re-entered" the United States. *United States v. Pacheco-Medina,* 212 F.3d 1162, 1166 (9th Cir. 2000). "Entry" requires more than physical presence. *Id.* at 1163. An alien has not "entered" the United States for purposes of § 1326 unless he does so "free of official restraint." *United States v. Lombera-Valdovinos,* 429 F.3d 927, 928 (9th Cir. 2005).

Entry requires freedom from "official restraint"

An alien who is on United States soil, but is "prevented from going at large within the United States," is under official restraint. *Lombera-Valdovinos,* 429 F.3d at 929.

"Restraint" may be in the form of surveillance

An alien does not have to be in physical custody to be officially restrained, so long as he is under surveillance. *United States v. Hernandez-Herrera,* 273 F.3d 1213, 1219 (9th Cir. 2001). This is because

even though the surveillance may be unknown to the alien, he "lacks the freedom to go at large and mix with the population." *Pacheco-Medina,* 212 F.3d at 1164. The following cases are instructive: *United States v. Zavala-Mendez,* 411 F.3d 1116, 1119 (9th Cir. 2005) (Aliens who are caught right at the border, under the full gaze of electronic surveillance are not "in" the United States enough to be legally "found in" the United States for purposes of § 1326); *Pacheco-Medina,* 212 F.3d at 1163-65 (defendant who had climbed international boundary fence and run past Border Patrol Agent, and was out of sight for a split second after rounding a corner, but was captured within a few yards of the border was not free from restraint).

In response to these arguments, the Fifth Circuit held that it has never explicitly adopted the official restraint doctrine, citing *United States v. Rojas,* 770 F.3d 366, 368 (5th Cir. 2014).

First Reason for Granting the Writ

Review on a writ of certiorari should be granted pursuant to Rule 10(a) of the Supreme Court Rules when a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same matter. The Fifth Circuit's non-recognition of the official restraint doctrine is in conflict with seven other circuits.

First Circuit

In *Dimova v. Holder*, 783 F.3d 30, 38 (1st Cir. 2015), the First Circuit adopted the Board of Immigration Appeals' interpretation of "entry," which requires freedom from official restraint. *Id.* at 38.

Second Circuit

"The official restraint doctrine requires both physical presence in the country as well as freedom from official restraint before an (internal quotes omitted) attempted entry becomes an actual entry." *United States v. Vasquez Macias*, 740 F.3d 96, 100 (2d Cir. 2014). *See also Ex parte Chow Chok,* 161 F. 627, 628-29 (N.D.N.Y.), *aff'd*, 163 F. 1021 (2d Cir. 1908) (aliens who cross the border and proceeded for a quarter of a mile

along railroad tracks, under surveillance the entire time, and then apprehended, were not "permitted to enter").

Third Circuit

"The requirement that the alien be free from official restraint to accomplish an entry into the United States applies to the crime of illegal entry in violation of 8 U.S.C. § 1325, as well as the crime of illegal re-entry under 8 U.S.C. § 1326." *United States v. Laville,* 480 F.3d 187, 198-99 (3d Cir. 2007) (McKee, J., concurring); *see also United States v. Vasilatos,* 209 F.2d 195, 197 (3d Cir. 1954) (crew member of Greek ship which had docked in the United States, prosecuted under predecessor statute to § 1326, held not to have entered the United States during period of detention pending formal disposition of request for admission).

Fourth Circuit

"[O]fficial restraint may take the form of government surveillance[.]" *De Leon v. Holder*, 761 F.3d 336, 341 (4th Cir. 2014).

Sixth Circuit

"A completed entry does not occur whenever the border patrol declines to play red rover with an alien in the middle of the Rio Grande.

The individual must evade inspection *and* be free of official restraint." *Lopez v. Sessions*, 851 F.3d 626, 630 (6th Cir. 2017).

Eighth Circuit

"Official restraint" continues for as long as an alien has no opportunity to get free of authorities. *Nyirenda v. Immigration & Naturalization Serv.,* 279 F.3d 620, 624 (8th Cir. 2002).

Ninth Circuit

An alien has not "entered" the United States for purposes of § 1326 unless he does so "free of official restraint." *United States v. Lombera-Valdovinos,* 429 F.3d 927, 928 (9th Cir. 2005).

Second Reason for Granting the Writ

The Fifth Circuit's non-recognition of the official restraint doctrine is in conflict with U.S. Supreme Court precedent. In *Kaplan v. Tod,* 267 U.S. 228 (1925), the Supreme Court held that a thirteen-year-old alien brought to Ellis Island and then committed to custody of the Hebrew Sheltering and Immigrant Aid Society, was legally still "at the boundary line and had gained no foothold in the United States".

Third Reason for Granting the Writ

Review on a writ of certiorari should be granted pursuant to Rule 10(a) of the Supreme Court Rules when a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The Fifth Circuit's reliance herein on *United States v. Rojas,* 770 F.3d 366, 368 (5th Cir. 2014) ignores clear Fifth Circuit prior precedent recognizing the doctrine of official restraint.

In *United States v. Cardenas-Alvarez,* 987 F.2d 1129 (5th Cir. 1993), a § 1326 case wherein the appellant was convicted of *attempted* illegal re-entry, he argued that he could not have attempted to re-enter because he was officially restrained by INS officers. *Id.* at 1132-33. The Fifth Circuit disagreed: "To graft 'freedom from official restraint' onto the crime of attempted entry would make that crime synonymous with actual entry." *Id.* at 1133. This constituted an implied holding that actual entry *does* in fact require freedom from official restraint. *See Schmidt v. United States,* 933 F.2d 639, 640 (8th Cir. 1991) ("Necessary to this expressed holding is an implied holding that strict compliance

with the statute of limitations is not a jurisdictional prerequisite to suing the government.").

In *United States v. Angeles-Mascote,* 206 F.3d 529 (5th Cir. 2000), wherein the appellant pled guilty to illegal re-entry, he argued for the first time on appeal that the factual basis did not support his guilty plea because it did not establish that he was "found in" the United States. *Id.* at 531. The factual basis provided:

> Angeles-Mascote, a citizen of Mexico, arrived at Dallas Fort Worth International Airport on a flight from Guadalajara, Mexico. He presented an alien registration card to a United States Immigration officer. The officer ran the alien registration card through a computer system which maintains records of aliens that have been deported from the United States. The computer provided a positive response to the defendant's name, showing that he had previously been arrested and deported from the United States. Angeles-Mascote is a citizen of Mexico. He has never been a United States citizen, and has never received permission from the Attorney General of the United States to re-enter this country. Angeles-Mascote has never applied for admission to the United States.

Id. at 530. The Fifth Circuit, reviewing for plain error, agreed with appellant based on the fact that when appellant was discovered, he was not free from "official restraint":

> In the present case, as established in the stipulated facts, Angeles-Mascote voluntarily approached the immigration

> officer at Dallas Fort Worth International airport. *Therefore, it cannot be said that he was discovered in or found in the United States. . . . This court has previously acknowledged* that there is a clear distinction between actual entry into the United States, and attempted entry. *See United States v. Cardenas-Alvarez,* 987 F.2d 1129, 1132-33 (5th Cir.1993). That distinction being that "actual entry" has been found by most courts to require both physical presence in the country *as well as freedom from official restraint*, while "attempted entry" only requires that the person approach a port of entry and make a false claim of citizenship or non-resident alien status. . . . In the present case, the stipulated facts establish only that Angeles-Mascote approached the port of entry at the airport, and presented immigration officials with an alien registration card. *Therefore, the factual basis of the guilty plea does not support the charge in the indictment* that Angeles-Mascote was "found in" and entered the United States. (emphasis added)

Id. at 531.

Conclusion

For the foregoing reasons, Petitioner Garcia respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ John A. Kuchera
JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN. 00792137
Attorney for Petitioner

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing petition for writ of certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 28th day of November, 2018.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Rene Garcia-Montejo