

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CANDELARIO LUCIO-GARZA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the crime of attempted illegal reentry incorporate the common-law *mens rea* of a specific intent to commit the completed offense?

PARTIES TO THE PROCEEDINGS

All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Candelario Lucio-Garza prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Westlaw version of opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Lucio-Garza's case is attached to this petition as the Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment and opinion was entered on March 26, 2019. *See* Appendix. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. § 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 any 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

Petitioner Candelario Lucio-Garza was found guilty by a jury of attempting to enter the United States illegally, illegally entering the United States, and being found illegally present in the United States after a prior removal, in violation of 8 U.S.C. § 1326(a) and (b).

At trial, the primary issue in dispute was whether Mr. Lucio-Garza intended to reenter the United States illegally, or whether he intended to present himself for inspection to ask for asylum. In support of his contention that he had no intention of reentering the United States illegally, but every intention of presenting himself to immigration agents at the port of entry to ask for asylum, Mr. Lucio-Garza requested that the district court permit him to cross-examine the arresting agents about statements that Mr. Lucio-Garza made to them at the time of his arrest on the international port of entry bridge between Pharr, Texas, and Reynosa, Mexico. He also sought to admit recordings of those statements from by those same agents' body and dashboard cameras. The government sought to exclude all evidence of Mr. Lucio-Garza's statements, making a number of arguments, including that Mr. Lucio-Garza's intent was not a defense to a charge under 8 U.S.C. § 1326.

The district court granted the government's motion, prohibiting counsel for the defense from cross-examining agents on statements that Mr. Lucio-Garza made concerning his intent and prohibiting the introduction of the audio portion of the videotaped encounter on the international bridge. At the same time, the district court permitted the government to introduce the video portion of the recorded statements, without audio, to prove where

Mr. Lucio-Garza was found (on the United States side of the bridge) and the circumstances of his finding (hidden at night after the bridge was closed, behind a curb near an area known for surreptitious entry). In addition to evidence regarding Mr. Lucio-Garza's prior removals from the United States, the district court also permitted the government to introduce evidence of Mr. Lucio-Garza's prior convictions for the same crime of illegal reentry under Fed. R. Evid. 404(b). And the district court permitted the government to introduce statements of other individuals arrested near the area where Mr. Lucio-Garza was arrested, in which statements those unidentified individuals admitted that they intended to jump the nearby fence to sneak into the United States without inspection.

In closing arguments, the government referred to Mr. Lucio-Garza's intent, citing his prior convictions as evidence of his knowledge of what he was doing and arguing that Mr. Lucio-Garza had received information that this manner was the way to enter the United States illegally. Counsel for Mr. Lucio-Garza argued that there was no evidence that the defendant intended to enter the United States illegally simply by reason of his past actions or his location on the bridge. However, given the district court's rulings, defense counsel was prohibited from arguing that Mr. Lucio-Garza's statements to arresting agents evinced that he intended to approach the port of entry the next day to apply for asylum.

Shortly after closing arguments, the jury returned a verdict of guilty. At sentencing, the district court sentenced Mr. Lucio-Garza to 40 months of imprisonment, to be followed by a three-year term of supervised release.

Mr. Lucio-Garza timely appealed. On appeal he argued that the district court

violated his Fifth and Sixth Amendment rights to present a complete defense and his right to confront witnesses when it prohibited him from cross-examining agents about his own statements to them concerning his intent to approach immigration agents and ask for asylum rather than evade inspection and when it prohibited him from introducing the complete videotape of his arrest, which included audio recordings of those same statements. Mr. Lucio-Garza argued that his statements were admissible as statements of his then-existing state of mind, under Fed. R. Evid. 803(3), and were also admissible under Fed. R. Evid. 106 to explain and place in context the silent video portion of the body- and dashcam recordings, the remaining evidence the government introduced under Fed. R. Evid. 404(b) and the hearsay evidence the government introduced concerning the statements of intent of other, previously arrested individuals near that same location on the international bridge.

Mr. Lucio-Garza recognized that the Fifth Circuit had long held that entering, attempting to enter or being found in the United States under 8 U.S.C. § 1326(a) all require only a “general intent” to commit the voluntary act of knowingly entering the United States. He argued that because of the inherent restrictiveness of the international bridge setting (fence surrounding the bridge, closed gates, entry to the official port of entry), that general intent could only be determined by whether Mr. Lucio-Garza intended to evade the official restraint inherent in that setting, or whether, as he stated to the agents who discovered him, he was waiting on the international bridge to apply for asylum.

The Fifth Circuit affirmed the judgment, ruling that whether Mr. Lucio-Garza

intended to reenter unlawfully was irrelevant:

Critically, the crime of illegal reentry is not a specific intent crime. Therefore, the Government needed to show only that Lucio-Garza had a general intent to reenter. A general intent mens rea under § 1326 merely requires that a defendant reenter the country voluntarily. It does not require an intent to act unlawfully.

United States v. Lucio-Garza, No. 18-40388, 762 Fed. Appx. 190, 191 (5th Cir. Mar. 26, 2019) (unpublished) (cleaned up). Noting that Mr. Lucio-Garza admitted in his videotaped statement that his attempt to enter the United States was voluntary, the Fifth Circuit found that whether his intent was to enter lawfully or not was irrelevant: “That Lucio-Garza had a lawful motive for attempting to reenter is irrelevant.” *Id.* at 191. That holding resolved the case: “Because evidence of Lucio-Garza’s intent to apply for asylum did not relate to an element that must be proven to convict him, its exclusion from trial did not preclude him from presenting a complete defense.” *Id.* (cleaned up).

Mr. Lucio-Garza now seeks to have this Court settle the circuit split on whether the crime of attempted illegal reentry requires the government to prove that the defendant had the specific intent to enter the United States without the lawful permission required under 8 U.S.C. § 1326.

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

- I. The Fifth Circuit's holding that the crime of attempted reentry does not require a specific intent to commit the underlying crime conflicts with this Court's decision in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007).**

In *Resendiz-Ponce*, this Court held that an indictment charging that the defendant attempted to enter the United States illegally after a previous removal was sufficient even though the indictment did not allege an overt act on the part of the defendant. *Resendiz-Ponce*, 549 U.S. at 104. The Court adopted as its framework the common law definition of attempt. "At 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 'some open deed tending to the execution of his intent.'" *Resendiz-Ponce*, 549 U.S. at 106 (quoting 2 W. LaFare, *Substantive Criminal Law* § 11.2(a), p. 205 (2d ed. 2003) (additional internal citations omitted)). The government argued that the indictment was sufficient because the allegation of an attempt incorporated the common law requirement of an overt act, and this Court agreed. *Resendiz-Ponce*, 549 U.S. at 107. The Court premised its agreement on the long history at common law that an attempt required both an intent and an overt act. "Not only does the word 'attempt' as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements." *Resendiz-Ponce*, 549 U.S. at 107. Because of that long history and shared understanding of the charge of attempt, "an indictment alleging attempted illegal reentry under § 1326(a) need not specifically allege a particular overt act or any other component part of the offense." *Id.* (cleaned up).

The meaning of *Resendiz-Ponce* is clear: the crime of attempted illegal reentry is defined by the common-law concept of attempt, and that concept incorporates a *mens rea* of the specific intent to commit the underlying crime. *See* 21 Am. Jur. 2d Criminal Law § 150, Westlaw (database updated May 2019); Antonin Scalia & Bryan Garner, *Reading Law* 320 (2012) (“A statute that uses a common-law term, without defining it, adopts its common-law meaning.”)

That is the interpretation that the Ninth Circuit has given to this Court’s holding in *Resendiz-Ponce*. In *United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016), the Ninth Circuit reaffirmed its longstanding precedent that the crime of attempted illegal reentry required a specific intent to enter the United States without the consent of the Attorney General and free of official restraint. *Id.* at 1154-55 (citing, among others, *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc)). In distinguishing its precedent from that of its sister circuits with which it was in conflict, *see infra* at 12-13, the Ninth Circuit stated,

All four of those cases, however, were decided before the Supreme Court’s decision in *United States v. Resendiz-Ponce*, 549 U.S. 102, 106-07, . . . (2007), which confirmed that the attempt prong of § 1326 incorporates the common law meaning of attempt, including an element requiring the specific intent to commit the underlying crime. *Resendiz-Ponce* confirms that *Gracidas-Ulibarry* was correctly decided.

Argueta-Rosales, 819 F.3d at 1160.

In this case, however, the Fifth Circuit continued to apply its own pre- and post-*Resendiz-Ponce* precedent that only a general intent to enter the United States voluntarily is required even for attempted illegal reentry. *See Lucio-Garza*, 762 Fed. Appx. at 191; *see*

also *United States v. Morales-Palacios*, 369 F.3d 442, 448-49 (5th Cir. 2004) (crime of attempted illegal reentry requires only general intent, not specific intent to enter without lawful authority). Based on that determination that only a general intent to voluntarily enter the United States is required, the Fifth Circuit held that Mr. Lucio-Garza's stated intent not to do so illegally, but instead to approach to ask for legal permission, was irrelevant, so that exclusion of evidence of Mr. Lucio-Garza's actual intent was harmless in that it did not preclude him from presenting a defense. *Lucio-Garza*, 762 Fed. Appx. at 191.

The Fifth Circuit's continued adherence to its precedent contradicts this Court's reasoning and its holding in *Resendiz-Ponce*. The Fifth Circuit's decision in *Morales-Palacios* is grounded in the view that must have been rejected in *Resendiz-Ponce*, namely, that the common law requirements of "attempt" do not apply to the crime of attempted illegal reentry: "We are not persuaded by Morales's assertion, nor by the reasoning of *Gracidas-Ulibarry*, because imputing the common-law meaning of elements of crimes into statutes is compelling only with respect to traditional crimes as distinct from regulatory offenses." *Morales-Palacios*, 369 F.3d at 447. Treating attempted illegal reentry as such a regulatory crime, the Fifth Circuit reasoned, the "Supreme Court has long held that where the peculiar nature and quality of the offense requires an effective means of regulation, such legislation may dispense with the conventional requirement for criminal conduct, to wit, awareness of some wrongdoing." *Morales-Palacios*, 369 F.3d at 448. This Court's decision in *Resendiz-Ponce* makes clear that the Fifth Circuit was wrong: the crime of

attempted illegal reentry requires exactly the common law elements of overt act and mental state, to the extent that such elements are implicitly incorporated into any indictment charging such an attempt. *See Resendiz-Ponce*, 549 U.S. at 787-88.

Because the Fifth Circuit's decision in this case, and its continued adherence to its precedent, including *Morales-Palacios*, conflict with this Court's decision in *Resendiz-Ponce*, this Court should grant certiorari and reverse the decision of the Fifth Circuit.

II. There is a longstanding conflict between the circuit courts of appeal on whether the crime of attempted illegal reentry requires as an element the specific intent to commit the underlying crime.

For almost twenty years, there has persisted a conflict between the circuit courts of appeal on whether the crime of attempted illegal reentry requires the specific intent to enter the United States unlawfully.

The Ninth Circuit's en banc decision in *Gracidas-Ulibarry* in 2000 adopted what later became this Court's view in *Resendiz-Ponce*: that the use of the term "attempt" in § 1326(a) incorporated the common law definition of that term and, according to the Ninth Circuit, the requirement of a specific intent to commit the crime attempted. *Gracidas-Ulibarry*, 231 F.3d at 1192-95. As reformulated by the Ninth Circuit, that level of intent is best expressed as having the purpose to enter the United States without the express consent of the Attorney General. *Id.* at 1196. The Ninth Circuit subsequently further refined this definition of the specific intent required for illegal reentry, based on its precedent that the intent required is to enter the country with the purpose to be free of official restraint, not to turn oneself in to the custody of officials. *See Argueta-Rosales*, 819 F.3d at 1155-56 (discussing *United States v. Lombera-Valdovinos*, 429 F.3d 927 (9th Cir. 2005)). The Ninth Circuit continues to follow this formulation, requiring that the jury be instructed that the crime of attempted reentry requires the specific intent to enter free from official restraint. *See United States v. Castillo-Mendez*, 868 F.3d 830, 838-39 (9th Cir. 2017) (The "critical inquiry in attempted illegal reentry cases is the defendant's mental state – whether he specifically intended to enter free from official restraint[,]” and finding that the defendant's

knowledge of whether he was under such restraint in the form of surveillance by immigration agents was relevant to the jury's determination of that issue.)

The Fifth Circuit has taken the opposite view. As noted, the Fifth Circuit has held that the crime of attempted illegal reentry requires only the general intent to enter the United States voluntarily, without regard to whether such entry had the purpose to avoid inspection or otherwise enter unlawfully. *See Morales-Palacios*, 369 F.3d at 449 (concluding that “when a previously deported alien, like Morales, voluntarily attempts to reenter the United States, he does so at his own peril[,]” and rejecting as irrelevant whether Morales held a reasonable belief that he acted with the Attorney General's permission). Other circuits have adopted the same position with regard to the intent requirement for attempted illegal reentry. *See United States v. Rodriguez*, 416 F.3d 123, 125 (2d Cir. 2005); *United States v. Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997); *United States v. Reyes-Medina*, 53 F.3d 327, 1995 WL 245343 at *1 (1st Cir. 1995) (unpublished). The Fifth Circuit has continued to apply the *Morales-Palacios* holding. *See, e.g., United States v. Martinez*, 717 Fed. Appx. 498, 499 (5th Cir. 2018) (unpublished) (no error in jury instruction because specific intent is not an element of attempted illegal reentry); *United States v. Zuñiga*, 633 Fed. Appx. 247, 248 (5th Cir. 2016) (unpublished) (defendant's belief that he had obtained the appropriate permission to was irrelevant under *Morales-Palacios*).

Resolving this entrenched circuit conflict is important, not only to Mr. Lucio-Garza's case, but also to ensure consistent application of criminal immigration laws nationwide.

In this case, if Mr. Lucio-Garza had been tried in the Ninth Circuit, the question of his actual intent would have been an important factor, most likely resulting in the admission of the evidence of his statements. In *Argueta-Rosales*, the Ninth Circuit specifically looked to evidence of whether the defendant intended to cross the border to enter into custody (which he, while suffering from drug-induced psychosis, considered to be protection from gunmen chasing him in Mexico) as being the key element in dispute that the district court was required to consider when determining guilt at a bench trial. *Argueta-Rosales*, 819 F.3d at 1155-56. And that evidence included Argueta's statements concerning his intent. *Id.* at 1158. In the Fifth Circuit, however, both the district court and the Fifth Circuit considered evidence of Mr. Lucio-Garza's actual intent to be irrelevant. The upshot was that while Mr. Lucio-Garza was prohibited from telling the jury about his own contemporaneous statements of intent, the government was permitted to enter multiple pieces of potentially prejudicial evidence, including evidence of Mr. Lucio-Garza's prior illegal reentry convictions under Fed. R. Evid. 404(b) and statements of other, unidentified aliens arrested in the same location, on the theory that this evidence was relevant to show his general intent. Because of the divergent views of these two courts of appeals, Mr. Lucio-Garza received a far different and far more restricted trial in the Fifth Circuit than he would have enjoyed in the Ninth Circuit. His right to present a complete defense should not have been dependent on the accident of the area of the United States in which he allegedly committed the offense.

This difference is important beyond Mr. Lucio-Garza's particular circumstances.

The United States Sentencing Commission Interactive Sourcebook of Federal Sentencing Statistics 2017, Table 17, (available at <https://isb.ussc.gov/> (last visited June 7, 2019)) shows that federal courts across the country sentenced 15,895 defendants in the year 2017 for illegally reentering the United States. Of that number, 3,317 defendants were sentenced in the Ninth Circuit, while 7,125 were sentenced in the Fifth Circuit. That means two-thirds of all illegal reentry prosecutions in the United States (at least those leading to sentencing by reason of a guilty plea or verdict) occurred in the two circuit courts of appeal that conflict on this fundamental issue of the mental state necessary to support a conviction for attempted illegal reentry. As is evident from the exclusion of evidence and limitation of cross-examination in Mr. Lucio-Garza's case, that conflict can lead to starkly different trials. And these two circuits account for every mile of the border between the United States and Mexico, except for the State of New Mexico. The divergence in their interpretation of the elements of the statute has a major impact on the prosecution of § 1326 cases in national terms.

Accordingly, the Court should grant Mr. Lucio-Garza's petition for certiorari to resolve the circuit conflict over the important question of whether the crime of attempted illegal reentry incorporates the common law requirement for attempt liability of a specific intent to commit the underlying crime. *See* Sup. Ct. R. 10(c).

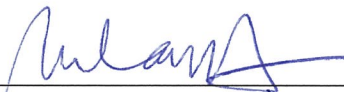
CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to ensure adherence to this Court's precedent and to resolve the circuit split on the important question of whether the crime of attempted illegal reentry incorporates the common law requirement for attempt liability of a specific intent to commit the underlying crime.

Date: June 13, 2019

Respectfully submitted,

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762 Fed.Appx. 190 (Mem)

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee

v.

Candelario **LUCIO-GARZA**, Defendant-Appellant

No. 18-40388

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Summary Calendar

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Filed March 26, 2019

Appeal from the United States District Court for the Southern District of Texas, USDC No. 7:17-CR-1701-1

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Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

Opinion

PER CURIAM: *

Candelario Lucio-Garza appeals his jury conviction for illegal reentry by a deported alien. See 8 U.S.C. § 1326(a), (b). Lucio-Garza contends that the district court violated his Fifth and Sixth Amendment rights to present a defense when it barred admission of the audio portion of dashboard and body camera videos of his encounter with police near the Pharr, Texas, port of entry, during which

Lucio-Garza stated his desire to apply for asylum. The district court also barred Lucio-Garza from questioning witnesses about his asylum request. Lucio-Garza argues that evidence of his intent to apply for asylum negated the mens rea element of § 1326. To that end, he moves to supplement the record on appeal with a transcript of the body camera video. We grant the motion to supplement the record and affirm the judgment.

Although “[s]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials,” *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (internal quotation marks and citation omitted), the Fifth and *191 Sixth Amendments “guarantee[] criminal defendants a meaningful opportunity to present a complete defense,” *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (internal quotation marks and citation omitted). We review an alleged violation of a defendant’s right to present a defense de novo, subject to harmless error. See *United States v. Lockhart*, 844 F.3d 501, 509-10 (5th Cir. 2016); *United States v. Skelton*, 514 F.3d 433, 438 (5th Cir. 2008). We also review a district court’s limitation on cross-examination de novo when, as here, a defendant asserts that the limitation violated his right to present a defense. See *Lockhart*, 844 F.3d at 509.

To prove that Lucio-Garza violated § 1326, the Government was required to show that (1) he was an alien; (2) he had been previously deported; (3) he attempted to enter the United States; and (4) he had not received the express consent of the Attorney General or the Secretary of Homeland Security. See *United States v. Jara-Favela*, 686 F.3d 289, 302 (5th Cir. 2012). Critically, “the crime of illegal reentry is not a specific intent crime[.]” *United States v. Flores-Martinez*, 677 F.3d 699, 712 (5th Cir. 2012). Therefore, the Government needed to show only that Lucio-Garza had a “general intent to reenter.” *Jara-Favela*, 686 F.3d at 302. “A general intent mens rea under § 1326 ... merely requires that a defendant reenter the country voluntarily.” *United States v. Guzman-Ocampo*, 236 F.3d 233, 237 (5th Cir. 2000) (italics omitted). It does not require an intent to “act unlawfully.” *United States v. Berrios-Centeno*, 250 F.3d 294, 299 (5th Cir. 2001).

Lucio-Garza does not dispute that he voluntarily attempted to reenter the United States; indeed, he conceded as much to police during the recorded

encounter. No greater showing was required to satisfy the mens rea element of § 1326. *See Guzman-Ocampo*, 236 F.3d at 237. That Lucio-Garza had a lawful motive for attempting to reenter is irrelevant. *See Flores-Martinez*, 677 F.3d at 712; *Berrios-Centeno*, 250 F.3d at 299. Because evidence of Lucio-Garza's intent to apply for asylum did not relate to "an element that must be proven to convict him," its exclusion from trial did not preclude him from presenting a complete defense. *Clark v. Arizona*, 548 U.S. 735, 769, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006).

Accordingly, the district court did not err in excluding that evidence. *See Holmes*, 547 U.S. at 324, 126 S.Ct. 1727; *Lockhart*, 844 F.3d at 509-10; *Skelton*, 514 F.3d at 438.

The motion to supplement the record is GRANTED. The judgment is AFFIRMED.

All Citations

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Footnotes

- * Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.