No. 18-9687

IN THE SUPREME COURT OF THE UNITED STATES

CANDELARIO LUCIO-GARZA, 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, 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.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Lucio-Garza, No. 7:17-cr-1701-1 (May 17, 2018)

United States Court of Appeals (5th Cir.):

United States v. Lucio-Garza, No. 18-40388 (Mar. 26, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 762 Fed. Appx. 190.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2019. The petition for a writ of certiorari was filed on June 13, 2019. 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 reenter the United States without permission following removal, in violation of 8 U.S.C. 1326(a) and (b). Judgment 1. He was sentenced to 40 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-2.

1. Petitioner is a native and citizen of Mexico. Presentence Investigation Report (PSR) ¶ 4. Beginning in April 2007, he has been removed from the United States five separate times. Each of the first four times, he unlawfully reentered the United States without inspection shortly thereafter. PSR ¶¶ 6-9.

In October 2017, just two weeks after his last removal, petitioner again attempted to enter the United States without inspection. PSR ¶ 4. Border Patrol agents found petitioner "hiding behind a concrete barrier, near closing time," at the Pharr, Texas, Port of Entry. Ibid. "This area is commonly used [by undocumented aliens] as a staging point" to cross the bridge after it closes. Ibid. After he was found by the agents, he claimed that he wished to seek asylum. Pet. App. 1.

2. Petitioner was charged with attempting to reenter the United States following a prior removal, in violation of 8 U.S.C. 1326(a) and (b). Pet. App. 1. At trial, petitioner sought to introduce evidence of his putative intent to apply for asylum,

claiming that it negated his mens rea. Ibid. The district court excluded that evidence as irrelevant.

The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1-2. Relying on its prior decisions in United States v. Jara-Favela, 686 F.3d 289, 302 (5th Cir. 2012), and United States v. Flores-Martinez, 677 F.3d 699, 712 (5th Cir.), cert. denied, 568 U.S. 906 (2012), the court explained that Section 1326 does not require specific intent to violate the law, but instead "merely requires that a defendant reenter the country voluntarily." Pet. App. 1 (quoting United States v. Guzman-Ocampo, 236 F.3d 233, 237 (5th Cir. 2000), cert. denied, 533 U.S. 953 (2001)). "Because evidence of [petitioner's] intent to apply for asylum did not relate to an element that must be proven to convict him," the court reasoned, "its exclusion from trial did not preclude him from presenting a complete defense." Id. at 2 (citation and internal quotation marks omitted).

ARGUMENT

Petitioner contends (Pet. 8-11) 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 (Pet. 9), such an element would require proof that the defendant had "a specific intent to enter the United States without the consent of the

Attorney General and free of official restraint." This Court has repeatedly denied review in other cases presenting similar claims. See Martinez v. United States, 139 S. Ct. 322 (2018) (No. 18-5036); 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. Section 1326 is a general-intent crime. It requires proof only of the defendant's intent to commit the unlawful act (reentry following removal), not a specific intent to violate the law.

The text of 8 U.S.C. 1326 provides no support for petitioner's claim that specific intent is required. 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 deported alien from attempting to enter the United States if he has not received express consent from the Attorney General (or the Secretary of Homeland Security, see 6 U.S.C. 202(3)-(4) (2012 & Supp. V 2017) and 6 U.S.C. 557) to reapply for admission. Nothing in the text of the statute requires proof that the defendant knew that he needed and lacked the express consent of the Attorney General or the Secretary of Homeland Security or specifically intended to violate the law.

In accord with the statutory text, 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 8 U.S.C. 1326. See United States v. Carlos-Colmenares, 253 F.3d 276, 277 (7th Cir.) (citing cases), cert. denied, 534 U.S. 914 (2001). Although petitioner accepted below that Section 1326 is a general-intent crime, see Pet. C.A. Br. 31-35, he now argues 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 8 U.S.C. 1326(a) would require the government to prove that the alien knew that he was not entitled to reenter the United States or 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 also 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 Leon, 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 was entitled 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).*

The unlikelihood that innocent conduct might run afoul of 8 U.S.C. 1326 further supports the court of appeals' reading of the statute. The only 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 enter 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 ("[D]eportation itself is sufficient to impress upon the mind of the deportee that

* The petition in this case was filed before this Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), but that decision does not affect the claim here. The Court held in Rehaif that the mens rea of knowledge in a prosecution for unlawful possession of a firearm under 18 U.S.C. 922(g) and 924(a)(2) applies "both to the defendant's conduct and to the defendant's status." 139 S. Ct. at 2194. The Court relied on the statutory term "knowingly." Id. at 2197. It did not, however, call into question differently worded statutes or the "maxim" under which "'ignorance of the law' (or 'mistake of law') is no excuse" in a context like this, where a defendant simply claims not to have intended to something illegal, id. at 2198 (citation omitted).

return is forbidden.") (quoting United States v. Torres-Echavarria, 129 F.3d 692, 698 (2d Cir. 1997), cert. denied, 522 U.S. 1153 (1998)) (brackets in original); 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"). And petitioner, in particular, had three prior illegal reentry convictions, indicating that if anyone would know he was not allowed to enter the country, he did.

Petitioner's reliance (Pet. 8) on United States v. Resendiz-Ponce, 549 U.S. 102 (2007), is misplaced. That case concerned the sufficiency of an indictment for attempted illegal reentry that did not expressly allege an overt act or any other component part of the offense. This Court held that an allegation that the defendant "attempted to enter the United States" was sufficient. Id. at 107 (citation omitted). Petitioner merely relies on 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 in furtherance of the offense. 549 U.S. at 106. 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"

does not necessarily equate to a specific intent to violate the immigration laws. Moreover, this Court has denied multiple petitions for certiorari in cases raising a similar claim to petitioner's after Resendiz-Ponce was decided. See Martinez, supra; Garcia, supra.

2. 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 Leon, 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); United States v. Reyes-Medina, 53 F.3d 327, 1995 WL 247343, at *1 (1st Cir. 1995) (Tbl.) (per curiam).

Petitioner argues (Pet. 12-13), 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 this case does. 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 the 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. 12-13) the Ninth Circuit's decision in United States v. Argueta-Rosales, 819 F.3d 1149 (2016). In that case, the defendant was found guilty of unlawful reentry following a bench trial at which he "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. The court reversed the conviction, relying on its prior holding that attempted illegal reentry "is a specific intent crime that requires proof of intent

to enter the country free from official restraint," and reasoning that the district court had applied an incorrect legal standard that allowed it to find guilt even if the defendant's sole "intent was to be taken into custody." Id. at 1156 (quoting United States v. Lombera-Valdovinos, 429 F.3d 927, 930 n.3 (9th Cir. 2005)). But both Argueta-Rosales and the precedent it deemed directly controlling addressed the distinct and narrow circumstance in which a defendant enters the United States "with the intent only to be imprisoned." Id. at 1155 (quoting Lombera-Valvodinos, 429 F.3d at 928).

3. For the reasons stated above, the question presented in the petition -- whether a prosecution for attempted entry in violation of Section 1326(a) requires proof of specific intent to violate the immigration laws -- does not warrant this Court's review. The district court did, however, err in granting the government's request to exclude as irrelevant evidence of petitioner's statements to the arresting agents, which he claimed supported his assertion that he was planning to walk across the bridge to the port of entry and ask for asylum (rather than cross the border illegally by sneaking around the port of entry). But that error was case-specific, is not the subject of the petition, and was harmless in light of the evidence overall.

a. For the reasons discussed above, an intent to seek asylum is not itself a defense to a Section 1326(a) charge. An intent merely to proceed to a port of entry to seek asylum, however, is

a valid defense. Section 1326(a) makes it unlawful for an alien who has previously been removed to "attempt[] to enter" the United States without obtaining the government's express consent "prior to * * * his application for admission from foreign continuous territory." 8 U.S.C. 1326(a)(2). Under longstanding United States immigration law, approaching a port of entry from a contiguous country and requesting asylum does not involve an "entry" into the United States. The port of entry is deemed to be at the threshold, even though it may in fact physically lie within the United States. E.g., Leng May Ma v. Barber, 357 U.S. 185, 188 (1958). As a result, "aliens subject to removal orders may continue to apply for asylum by lawfully approaching a port of entry without illegally crossing the border." Cazun v. Attorney Gen., 856 F.3d 249, 261 n.20 (3d Cir. 2017), cert. denied, 138 S. Ct. 2648 (2018). An alien who has previously been removed thus does not violate Section 1326(a) simply by attempting to lawfully approach a port of entry to seek asylum.

Accordingly, if it were true that petitioner had, in fact, harbored such an intent -- rather than an intent to enter the country without inspection, even if he would thereafter have sought protection from removal after the illegal entry, see, e.g., United States v. Brizuela, 605 Fed. Appx. 464 (5th Cir. 2015) (per curiam) -- he would not be guilty of violating Section 1326. Evidence of his intent in hiding at the bridge was, therefore, relevant at trial. Petitioner has not, however, pressed this argument in his

petition for a writ of certiorari, which focuses exclusively on whether Section 1326 requires specific intent to violate the law. The court of appeals also did not pass on the meaning of "entry," and this Court is one of review, not first view. E.g., Byrd v. United States, 138 S. Ct. 1518, 1527 (2018).

b. In any event, although the evidence was relevant, its exclusion was harmless in light of the other evidence presented. The evidence petitioner sought to admit (Pet. 3) consisted solely of his own uncorroborated statements to officers following his arrest, which he contend supported his claim that he intended to "present[] himself to immigration agents at the port of entry to ask for asylum." Whatever limited probative value those statements might have in isolation, extensive record evidence contradicted them: The evidence showed that petitioner was arrested while hiding behind a concrete barrier on a bridge into the United States, at night, see Gov't C.A. Br. 9, 13, which is not ordinary behavior for a person who simply wishes to approach a port of entry lawfully and ask for asylum while the port of entry is open. The evidence also showed that the area where petitioner was arrested is used "all the time" by aliens who hide there to illegally cross into the United States, id. at 7 (citation omitted), and other individuals arrested nearby "admitted that they intended to jump the nearby fence to sneak into the United States without inspection," Pet. 4.

In addition, petitioner's arrest occurred only two weeks after his most recent removal -- and petitioner had previously reentered the United States without inspection four times, all of which occurred almost immediately after the previous removal. See PSR ¶¶ 4, 8-9. Petitioner presented no documentation to support his claim of persecution, and the fact that he was removed only two weeks earlier meant that only a short window existed in which petitioner could possibly have faced persecution. Moreover, if the district court had admitted evidence of petitioner's statements to arresting officers that he intended to apply for asylum, the government could have responded by introducing evidence that petitioner also told the arresting officers that he intended to enter the United States without inspection. See Gov't C.A. Br. 13-15.

In light of the record as a whole, no sound basis exists for concluding that the jury would have believed self-serving post-arrest statements suggesting that he merely wished to seek asylum at the port of entry, rather than sneak into the country without inspection. The exclusion of that evidence accordingly was erroneous, but did not have a "substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750, 776 (1946). No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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