

No. 18-9687

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

PETITIONER'S REPLY TO THE BRIEF
FOR THE UNITED STATES IN OPPOSITION

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner Candelario Lucio-Garza submits this reply to the Brief in Opposition (“BIO”) filed by the United States.

Mr. Lucio-Garza’s petition asks this Court to determine whether the crime of attempted illegal reentry in violation of 8 U.S.C. § 1326 requires proof that the accused had the intent to do what the law forbids: reenter the United States following his deportation without first obtaining consent and to do so free of official constraint. He seeks this review because the Fifth Circuit in this case reiterated its longstanding rule that this offense requires only a “general intent to reenter,” meaning that the “defendant reenter the country voluntarily.” *United States v. Lucio-Garza*, 762 Fed. Appx. 190, 191 (5th Cir. 2019) (unpublished). Consequently, according to the Fifth Circuit, the district court committed no error in excluding all of Mr. Lucio-Garza’s evidence at trial that his intent in remaining on the closed bridge spanning the border between the United States and Mexico was for the purpose of applying for asylum at the port of entry the next day because such an intent is irrelevant. *Id.*

Mr. Lucio-Garza identified in his petition an equally longstanding split among the federal circuits, in particular, the rule of the Ninth Circuit set out in *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc), and *United States v. Argueta-Rosales*, 819 F.3d 1149, 1155-56 (9th Cir. 2016). The government attempts to argue that those cases must be narrowed to their facts. BIO at 9-11. But the government’s

argument ignores the actual holdings of the Ninth Circuit establishing the exact opposite of the rule applied by the Fifth Circuit in this case.

The Ninth Circuit stated its contrary rule most clearly in *Gracidas-Ulibarry*:

. . . we hold the elements of the crime of attempted illegal reentry into the United States under 8 U.S.C. § 1326 are: (1) the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General; (2) the defendant committed an overt act that was a substantial step towards reentering without that consent; (3) the defendant was not a citizen of the United States; (4) the defendant had previously been lawfully denied admission, excluded, deported or removed from the United States; and (5) the Attorney General had not consented to the defendant's attempted reentry.

Gracidas-Ulibarry, 231 F.3d at 1196. And the Ninth Circuit found it to be “constitutional error by failing to instruct the jury on the specific intent element of the crime.” *Id.* More recently in *Argueta-Rosales*, the Ninth Circuit explicitly reiterated the exact opposite rule of that adopted by the Fifth Circuit: namely, attempted illegal reentry “requires proof of specific intent, more particularly the specific intent to reenter without consent” and “the specific intent to enter the country free from official restraint.” *Argueta-Rosales*, 819 F.3d at 1155-56 (internal quotation marks and citations omitted). In doing so the Ninth Circuit rejected the argument the government proffers here, BIO at 11, namely, that the Ninth Circuit’s ruling applies only when there is no evidence of anything other than the intent to be taken into custody.

We now clarify that where, as here, there is contradictory evidence regarding the defendant's intent, it is for the trier of fact to determine whether the government has proven unlawful intent beyond a reasonable doubt. . . . The government must prove only that Argueta had a specific intent to enter

the United States free from official restraint, not that this was his only purpose.

Argueta-Rosales, 819 F.3d at 1157.

As demonstrated by the comparison of the Fifth Circuit’s decision in Mr. Lucio-Garza’s case with the Ninth Circuit decisions in *Gracidas-Ulibarry* and *Argueta-Rosales*, the two circuit courts of appeals covering the vast majority of the southern United States border have adopted starkly different intent requirements for the crime of attempted illegal reentry. This Court should resolve that longstanding circuit conflict.

More importantly, the government’s own briefing implies the recognition that the definition of intent Mr. Lucio-Garza advocates based on the Ninth Circuit case law is required to prove this offense.

The government’s argument that “specific intent” is not required is based on a definition of “specific intent” as an intent to violate the law, a definition for which Mr. Lucio-Garza is not advocating. The government states, “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.” BIO at 4. The government restates this formulation in arguing 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” or with knowledge that the action “is for him criminal conduct.” BIO at 6 (internal citations omitted).

But Mr. Lucio-Garza is not proposing that “specific intent” requires that the defendant intend or even know that his conduct violates the law. On the contrary, Mr.

Lucio-Garza's formulation is consistent with the government's own argument that the defendant must intend to do the unlawful act. It is a formulation drawn from the Ninth Circuit case law and focusing on whether he intended to commit the unlawful act: reenter the United States without permission and to do so free of official constraint. Petition at 9, 12-13, 14.

Despite its opposition to Mr. Lucio-Garza's petition, the government recognizes in its brief that the formulation of intent Mr. Lucio-Garza advocates *is* required. The government states that "an intent to seek asylum is not itself a defense to a Section 1326(a) charge," but "[a]n intent merely to proceed to a port of entry to seek asylum, however, is a valid defense." BIO at 11-12. This is exactly the intent that Mr. Lucio-Garza attempted to assert at trial, Petition at 3, and exactly the intent that the Fifth Circuit ruled was irrelevant in affirming the district court. The government thus recognizes that the intent to do something lawful – approach a port of entry and request asylum – is "a valid defense." BIO at 12. "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." BIO at 12.

In making this admission, the government implicitly recognizes that Mr. Lucio-Garza's intent was relevant to the determination of his guilt. In doing so, the government is also implicitly rejecting the "general intent" definition that the Fifth Circuit applied in this case, requiring only a voluntary act in reentering the United States and, in the Fifth Circuit's view, making Mr. Lucio-Garza's actual intent to do the lawful act of requesting asylum at the port of entry irrelevant. *See Lucio-Garza*, 762 Fed. Appx. at 191.

Underlying the dispute about the meaning of terms such as specific versus general intent, the ultimate issue in this case is the degree of guilty mind necessary to prove this attempt offense. Is it, as the Fifth Circuit holds, simply the voluntary act of trying to reenter the United States, regardless of purpose, or is it, as the Ninth Circuit has held, trying to reenter with the purpose of doing so without consent and free of official constraint? The government's arguments concerning the particular evidence of intent Mr. Lucio-Garza sought to enter at trial support Mr. Lucio-Garza's claim.

The government asserts that permitting the Fifth Circuit's "general intent" rule to stand does not run a risk of encompassing innocent conduct within the ambit of the statute, so that this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019) is not implicated. BIO at 7 & n.*. But, if the government's own formulation of intent in the BIO is correct, that is not true with regard to the southern border. Thousands of would-be immigrants have approached ports of entry to seek asylum by lining up on the same type of bridge on which Mr. Lucio-Garza was found, and they have done so by camping for days at a time. See Molly Hennessy-Fiske, *Caught in limbo, Central American asylum-seekers are left waiting on a bridge over the Rio Grande*, Los Angeles Times (June 7, 2018), <https://www.latimes.com/nation/la-na-asylum-seeking-families-border-bridges-20180605-story.html>; Neena Satija and Juan Luis García Hernández, *On a bridge over the Rio Grande, immigrants seeking asylum wait for a chance to enter the U.S.*, The Texas Tribune (June 20, 2018), <https://www.texastribune.org/2018/06/20/bridge-over-rio-grande-immigrants-seeking-asylum-wait-chance-enter-us/>.

As the photographs taken from the cited Los Angeles Times article demonstrate, long lines of people congregate to do exactly what Mr. Lucio-Garza said he had the intent to do and wanted to present evidence of at his trial. Under the Fifth Circuit formulation of the required intent, Mr. Lucio-Garza and any other previously deported individual in that line would have committed the offense of attempted illegal reentry just by the voluntary act of approaching the United States to reenter. Under the government's own formulation, however, all of those same people would be innocent of the offense if their intent was to approach the port of entry and seek asylum.





The issue Mr. Lucio-Garza presents to this Court merits granting a writ of certiorari. The conflict between the Fifth and the Ninth Circuits on the issue of the required intent for commission of attempted illegal reentry has persisted for almost two decades. Those circuits cover almost the entirety of the southern border and the largest number of prosecutions for this offense each year. Petition at 15. That split has engendered confusion, as reflected in the government's arguments in the BIO that recognize that some form of purpose or intent is an element of this offense. For these reasons and those set out in the Petition, this Court should grant the petition for writ of certiorari.

CONCLUSION

For the reasons stated above, in addition to the reasons in the Petition for a writ of certiorari, this Court should grant the Petition for a writ of certiorari.

Date: October 22, 2019

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