No. _____

In the
Supreme Court of the United States

CARLOS ELOY GARCIA-GARCIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN JOEL PAGE
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS, 75202
(214) 767-2746

Counsel for Petitioner

QUESTIONS PRESENTED

Whether an alien may be "found" within the meaning of 8 U.S.C. §1326 before immigration authorities achieve actual knowledge of his or her actual presence in the United States?

PARTIES TO THE PROCEEDING

Petitioner is Carlos Eloy Garcia-Garcia, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

PARTIES TO THE PROCEEDING. ii

TABLE OF AUTHORITIES. iv

OPINIONS BELOW. 1

JURISDICTION. 1

STATUTORY PROVISIONS INVOLVED. 1

STATEMENT OF THE CASE. 2

REASONS FOR GRANTING THE PETITION. 4

The decision below is in conflict with the decision of another United States court of appeals on the important matter of whether an alien may be "found" within the meaning of 8 U.S.C. §1326 before immigration authorities achieve actual knowledge of his or her actual presence in the United States.. 4

CONCLUSION. 7

TABLE OF AUTHORITIES

Cases

United States v. Clarke, 312 F.3d 1343 (11th Cir. 2002) 4

United States v. Compian-Torres, 712 F.3d 203 (5th Cir. 2013) 3, 4, 5, 6

United States v. Diaz-Diaz, 135 F.3d 572 (8th Cir. 1998) 4

United States v. DiSantillo, 615 F.2d 128 (3d Cir.1980) 4

United States v. Garcia-Garcia, 770 Fed Appx. 231 (5th Cir. May 17, 2019) . 1

United States v. Gomez, 38 F.3d 1031 (8th Cir. 1994) 4, 5, 6

United States v. Gunera, 479 F.3d 373 (5th Cir. 2007) 4, 5

United States v. Guzman-Bruno, 27 F.3d 420 (9th Cir.1994) 4, 5

United States v. Hernandez, 189 F.3d 785 (9th Cir. 1999) 4

United States v. Herrera-Ordones, 190 F.3d 504 (7th Cir. 1999) 4

United States v. Hooten, 942 F.2d 878 (5th Cir. 1991) 6

United States v. Meraz-Valeta, 26 F.3d 992 (10th Cir.1994) 4

United States v. Rivera-Ventura, 72 F.3d 277 (2d Cir.1995) 4

United States v. Rodriguez-Rodriguez, 453 F.3d 458 (7th Cir. 2006) 4

United States v. Santana-Castellano, 74 F.3d 593 (5th Cir. 1996) 4, 5

Weaver v. Graham, 450 U.S. 24 (1981) 6

Statutes

8 U.S.C. §1326 . . . . . passim

8 U.S.C. §1326(a) 1

28 U.S.C. §1254(1) 1

United States Constitution

Art. 1, § 9 1

United States Sentencing Guidelines

USSG §2L1.2 (2014) 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carlos Eloy Garcia-Garcia respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the court of appeals is reported as *United States v. Garcia-Garcia*, 770 Fed Appx. 231 (5th Cir. May 17, 2019), and is reprinted as Appendix A. The district court's sentencing decision was documented in a written judgment, reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2019. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1326(a) of Title Eight of the United States Code provides in part:

> (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 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...

Article One, Section Nine of the United States Constitution provides in part:

> No bill of attainder or ex post facto Law shall be passed.

STATEMENT OF THE CASE

1. Facts and Proceedings in District Court

Petitioner Carlos Eloy Garcia was born just outside the United States in Nuevo Laredo. *See* (Record in the Court of Appeals, at p.115). His parents brought him into the country without legal status when he was four. *See* (Record in the Court of Appeals, at p.115). When he was 21, he sustained a federal conviction for a drug crime, and suffered deportation. *See* (Record in the Court of Appeals, at pp.107, 110-111). As he explained to Probation, he re-entered the country in 2010 and began working in food service. *See* (Record in the Court of Appeals, at pp.106, 117).

In 2017, Petitioner was convicted for a drug possession crime.*See* (Record in the Court of Appeals, at p.111). Shortly thereafter, his presence was noted by ICE agents. *See* (Record in the Court of Appeals, at p.106). He pleaded guilty to illegal re-entry after deportation, in violation of 8 U.S.C. §1326.

Using the 2016 version of the Guidelines, a Probation officer calculated a Guideline range of 57-71 months imprisonment. *See* (Record in the Court of Appeals, at pp.107, 118). This was the product of an 18 level upward adjustment to the offense level. *See* (Record in the Court of Appeals, at p.108). Before the effective date of the 2015 Guidelines, the maximum upward adjustment to an illegal re-entry offense was 16 levels. *See* USSG §2L1.2(b)(2014).

Petitioner objected to the Guidelines, contending that the use of the 2016 Guidelines violated the constitution's *ex post facto* clause because he had entered well before 2015. *See* (Record in the Court of Appeals, at p.122-123). But the government and Probation disagreed, noting that an offense under §1326 continues until immigration authorities find the defendant. *See* (Record in the Court of Appeals, at pp.127-133). The defense conceded the objection. *See*

(Record in the Court of Appeals, at pp.134-135). But to preserve review it asserted that an alien should be deemed "found" when immigration has reason to know of his or her illegal presence. *See* (Record in the Court of Appeals, at p.134-135). This is so, he argued, even if ICE lacks actual awareness of the alien's presence. *See* (Record in the Court of Appeals, at pp.134-135).

The district court overruled the objection because it was bound by Fifth Circuit law. *See* (Record in the Court of Appeals, at p.83). It did not find that ICE lacked constructive knowledge of Petitioner's presence in the country. *See* (Record in the Court of Appeals, at p.83). The defendant received a sentence of 71 months, the high end of the applicable Guideline range. *See* (Record in the Court of Appeals, at p.93).

2. Appeal

On appeal, Mr. Garcia-Garcia contended that the district court erred in omitting any finding as to when ICE acquired constructive knowledge of his physical presence in the United States. Specifically, he maintained that when constructive knowledge of an alien's physical presence and illegality is attributable to immigration authorities, the offense denounced in 8 U.S.C. §1326 is complete and terminated. At that point, he argued, the alien obtains *ex post facto* protections against the application of more severe Sentencing Guidelines, such as the ones that became effective in 2016 here. But he conceded that *United States v. Compian-Torres*, 712 F.3d 203 (5th Cir. 2013), held constructive knowledge of an alien's physical presence irrelevant, and presented the claim solely to preserve review by this Court.

Finding itself bound by *Compian-Torres*, the Fifth Circuit affirmed. [Appx. A].

REASONS FOR GRANTING THE PETITION

The decision below is in conflict with the decision of another United States court of appeals on the important matter of whether an alien may be "found" within the meaning of 8 U.S.C. §1326 before immigration authorities achieve actual knowledge of his or her actual presence in the United States.

Section 1326 of Title Eight provides up to twenty years imprisonment when a previously removed alien is "found" in the United States without authorization. Because the offense terminates when the alien is "found," the moment of "finding" is critical to the resolution of sundry legal questions arising in §1326 litigation. *See United States v. Rivera–Ventura*, 72 F.3d 277, 281-282 (2d Cir.1995); *United States v. Compian-Torres*, 712 F.3d 203 (5th Cir. 2013); *United States v. Herrera-Ordones*, 190 F.3d 504, 510 (7th Cir. 1999); *United States v. Gomez*, 38 F.3d 1031, 1035-1038 (8th Cir. 1994); *United States v. Guzman–Bruno*, 27 F.3d 420 (9th Cir.1994); *United States v. Meraz–Valeta*, 26 F.3d 992, 997 (10th Cir.1994); *United States v. Clarke*, 312 F.3d 1343, 1348 (11th Cir. 2002). These include the statute of limitations, *see United States v. Gunera*, 479 F.3d 373, 376 (5th Cir. 2007); *United States v. DiSantillo*, 615 F.2d 128, 134-135 (3d Cir.1980); *Gomez*, 38 F.3d at 1035-1038, venue, *see United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006); *United States v. Diaz-Diaz*, 135 F.3d 572, 577 (8th Cir. 1998); *United States v. Hernandez*, 189 F.3d 785 (9th Cir. 1999), the propriety of concurrent or consecutive sentences under the Federal Sentencing Guidelines, *see United States v. Santana–Castellano*, 74 F.3d 593, 597 (5th Cir. 1996), whether a defendant commits the offense of illegal re-entry while held against his or her will in a state prison for the purposes of criminal history enhancements under the Guidelines, *see Santana–Castellano*, 74 F.3d at 597, and, as here, the

application of the ex post facto clause, *see* [Appendix A]; *Guzman–Bruno*, 27 F.3d at 422-423.

The court below has held that an alien is not "found" under §1326 unless immigration authorities achieve actual knowledge of his or her physical presence in the United States. *See* [Appendix A]; *Compian-Torres*, 712 F.3d at 209 ("for an alien to be 'found' under § 1326, immigration authorities must discover and note the alien's physical presence, and the illegality of the alien's presence must be known or reasonably attributable to immigration authorities."); *accord United States v. Santana–Castellano*, 74 F.3d 593, 598 (5th Cir.1996). In the court below, constructive knowledge that an alien's presence is illegal will show a "finding," *see United States v. Gunera*, 479 F.3d 373, 376 (5th Cir. 2007), but as to physical presence, actual knowledge is required, *see Compian-Torres*, 712 F.3d at 208-209.

This conflicts with the decision of the Eighth Circuit in *United States v. Gomez*, 38 F.3d 1031 (8th Cir. 1994). Gomez involved a §1326 prosecution, in which the previously deported defendant voluntarily entered an INS office seeking to change his immigration status. *See Gomez*, 38 F.3d at 1033. Upon entering the office, however, the defendant provided a fake name. *See id.* He also provided his fingerprints, which could have been used to link him to his true name and prior deportation. *See id.* Immigration authorities did not actually discover the prior deportation until a subsequent arrest, after which prosecutors obtained a §1326 indictment. *See id.* The defendant sought dismissal of the indictment on the grounds that the statute of limitation had expired - more than the requisite five years had passed since he entered the INS office and provided his fingerprints. *See id.*

The Eighth Circuit analyzed the statute and held that an alien may be "found" "when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation" of §1326. *Id*. at 1037. Although it believed that provision of fingerprints may provide constructive knowledge of the violation, it did not think that such knowledge would be attributable to immigration authorities until after a reasonable time for processing the prints. *See id.* at 1038. Nonetheless, its unitary formulation – that constructive knowledge accrues when "the violation" could have been discovered – plainly conflicts with the test applied in the court below. Under the Gomez formulation, it is plainly possible to have constructive knowledge of a "violation" even without actual knowledge of an alien's physical presence. By contrast, the court below finds constructive knowledge of physical presence irrelevant. *See Compian-Torres*, 712 F.3d at 208-209.

This conflict is well presented here. Application of the ex post facto clause depends on the date a defendant's offense concludes. *See Weaver v. Graham*, 450 U.S. 24, 31 (1981). But current Fifth Circuit law makes constructive knowledge of an alien's physical presence irrelevant to the date a §1326 offense concludes. As such, the district court made no findings as to the date that ICE acquired constructive knowledge of the defendant's physical presence. The absence of findings as to constructive knowledge would be error under a constructive knowledge standard. *See United States v. Hooten*, 942 F.2d 878, 882 (5th Cir. 1991)(remand appropriate where district court omits findings essential to a proper resolution of a Guideline issue).

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

/S/ KEVIN JOEL PAGE
KEVIN JOEL PAGE
Counsel of Record
Federal Public Defenders Office
Northern District of Texas
525 Griffin Street, Suite 629
Dallas, Texas, 75202
(214) 767-2746
August 9, 2019