No. 20-8201

IN THE SUPREME COURT OF THE UNITED STATES

ANDRES ABELINO AYON-BRITO, AKA HUGO AYON-BRITO,
AKA JOEL DIAZ GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

PAUL T. CRANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in a prosecution for illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a), venue was proper in a district in which petitioner was encountered by law-enforcement officers while he engaged in drug trafficking.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 981 F.3d 265.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 2020. A petition for rehearing was denied on December 29, 2020 (Pet. App. 8a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a

timely petition for rehearing. The petition for a writ of certiorari was filed on May 28, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a). Judgment 1. Petitioner was sentenced to six months of imprisonment, to be followed by one year of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-7a.

1. Petitioner, a native and citizen of Mexico, was removed from the United States in 2010 and, after illegally reentering the United States, was removed again in 2013. Pet. App. 3a; D. Ct. Doc. 32 ¶¶ 1-4 (Mar. 11, 2019) (Stipulation of Facts). Sometime thereafter, petitioner again illegally reentered the United States and went to Virginia, where he had previously lived and worked. Pet. App. 3a; Stipulation of Facts ¶ 5.

Between September and November 2014, petitioner, using an alias, sold cocaine to an undercover police officer in Fairfax County, Virginia, on three separate occasions. Presentence Investigation Report (PSR) ¶ 38. Suspecting that petitioner was transporting cocaine from outside Virginia, Fairfax County police officers placed a GPS tracking device on petitioner's vehicle and

learned that he was traveling to Maryland and Pennsylvania before returning to Virginia to sell cocaine. Ibid.

In December 2014, petitioner was arrested in Cumberland County, Pennsylvania, on a Pennsylvania state drug charge. C.A. App. 22; PSR ¶ 47. The same day, federal immigration officials in Philadelphia placed a detainer on petitioner. C.A. App. 47. For undisclosed reasons, however, the detainer was cancelled the following day, id. at 49, and the Pennsylvania state charge was subsequently withdrawn, PSR ¶ 47.

In March 2015, petitioner was arrested in Fairfax County, Virginia, and charged with the three drug sales to an undercover officer noted above. PSR ¶ 38. Petitioner used an alias while being processed for that arrest, and he was subsequently charged with forgery of a public record under Virginia law. PSR ¶ 39. Petitioner ultimately pleaded guilty to the Virginia drug-distribution and forgery charges and was sentenced to seven years of imprisonment. PSR ¶¶ 38-39.

2. In July 2015, federal immigration officials were informed of petitioner's presence in Fairfax County, Virginia, in the Eastern District of Virginia. Stipulation of Facts ¶ 8; C.A. App. 22. A federal grand jury in the Eastern District of Virginia returned a superseding indictment charging petitioner with illegally reentering the United States following removal, in violation of 8 U.S.C. 1326(a). Superseding Indictment 1. Section 1326(a) provides in relevant part that, with certain exceptions,

"any alien who * * * has been * * * removed * * * and thereafter * * * enters, attempts to enter, or is at any time found in, the United States * * * shall be fined under title 18, or imprisoned not more than 2 years, or both." 8 U.S.C. 1326(a); see 8 U.S.C. 1326(b) (specifying enhanced penalties for certain defendants).

The caption of the superseding indictment in this case described the charge under 8 U.S.C. 1326(a) as a charge of "Illegal Reentry after Deportation." Superseding Indictment 1. The indictment alleged that, "[o]n or about December 14, 2014, in Cumberland County, Pennsylvania, [petitioner] * * * was found in the United States after having been removed from the United States." Ibid. It further alleged that, "[p]rior to December 14, 2014, and after [petitioner's] illegal reentry, [petitioner] was encountered by members of the Fairfax County Police Department on or about September 30, October 23, and November 18, 2014, at or near Fairfax County, within the Eastern District of Virginia." Ibid.

Petitioner moved to dismiss the superseding indictment for improper venue. D. Ct. Doc. 22 (Feb. 7, 2019). Petitioner contended that venue was not proper in the Eastern District of Virginia because the indictment "allege[d] that [he] was 'found in' Cumberland County, Pennsylvania." Id. at 4. The district court denied the motion. D. Ct. Doc. 28 (Feb. 22, 2019). The court observed that, "[w]ith respect to the crime set forth in

Section 1326(a) that [petitioner] ha[d] been charged with, Congress has enacted a specific venue provision which allows for venue at any place in the United States at which the violation may occur or where the defendant may be apprehended." 2/22/19 Tr. (Tr.) 18; see Tr. 19-20 (discussing 8 U.S.C. 1329); 8 U.S.C. 1329 (providing in relevant part that, "[n]otwithstanding any other law," prosecutions under Section 1326 "may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation * * * may be apprehended"). The court explained that "courts throughout the United States have" recognized that a "'found in' violation" under 8 U.S.C. 1326(a) "is a continuing offense for venue purposes and, therefore, commences with the illegal entry and continues through discovery by immigration authorities." Tr. 19.

The district court found further support that venue was proper in the Eastern District of Virginia in 18 U.S.C. 3237(a), which provides that, "[e]xcept as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." Ibid.; see Tr. 20-21. The court noted that Section 3237(a) "provides that it governs offenses involving the importation of a person into the United States," which the court understood to encompass "illegal reentry." Tr. 21; see 18 U.S.C. 3237(a)

(providing in part that "[a]ny offense involving * * * the importation of [a] * * * person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such * * * person moves").

The district court explained that, "[b]ecause [a] 'found in' violation of [Section] 1326 is a continuing offense, venue is proper in any district in which such offense was begun, continued, or completed, and this would include any district in which the defendant was present between the time of his illegal reentry and the time he was found by immigration authorities." Tr. 21. And the court observed that, in this case, "the superseding indictment alleges that [petitioner] was encountered by members of the Fairfax County Police Department * * * in Fairfax County * * * between the time he illegally reentered the United States" and "when he was found by immigration authorities in Pennsylvania." Tr. 21-22. The court accordingly found that, "on the face of the indictment, venue is proper in" the Eastern District of Virginia and denied petitioner's motion. Tr. 22.

Petitioner was convicted of the charge following a bench trial. Judgment 1. The district court sentenced petitioner to six months of imprisonment, to run consecutively to any state-court sentence. Judgment 2.

3. The court of appeals affirmed, agreeing with the district court that venue for petitioner's prosecution was proper in the Eastern District of Virginia. Pet. App. 4a-7a.

The court of appeals observed that, "for violations of § 1326(a) in particular, Congress has established venue -- consistent with the Constitution -- 'at any place in the United States at which the violation may occur.'" Pet. App. 4a (quoting 8 U.S.C. 1329). The court additionally noted that, under Section 3237(a), "when a violation occurs in more than one district -- such as where the elements of the offense are satisfied in different districts or where the offense by its nature is a continuing offense -- venue is appropriate in any district in which the violation 'was begun, continued, or completed.'" Id. at 5a (quoting 18 U.S.C. 3237(a)). The court explained that the key question is thus "where was [petitioner's] violation of § 1326(a) committed -- or * * * where did it occur." Ibid. The court reasoned that "the answer to that question turns on the nature of the offense, focusing on its elements." Ibid. (citing Richardson v. United States, 526 U.S. 813, 818-19 (1999), United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999), and United States v. Cabrales, 524 U.S. 1, 6-7 (1998)).

The court of appeals observed that the elements of a Section 1326(a) offense are: "(1) that the defendant is an alien; (2) that he was deported or removed from the United States; (3) that he thereafter reentered (or attempted to reenter) the United States;

and (4) that he lacked permission to do so." Pet. App. 5a. The court explained that, "[u]nder th[at] formulation, the 'found' term in the statute is not employed to define an element" but rather "'to avoid any need to prove where and when the alien entered; the offense follows the alien.'" Ibid. (quoting United States v. Rodriguez-Rodriguez, 453 F.3d 458, 460 (7th Cir. 2006)). The court additionally noted that, "because 'found' does not itself refer to an act or conduct of the defendant, it does not describe a conduct element" of the kind ordinarily relevant to venue analysis. Id. at 6a; see id. at 6a & n.2. The court explained that "Congress included the term to extend the scope of the conduct element 'entry' to when and where the alien is found, thus creating a continuing offense centered on the alien's entry into the United States and presence therein until found." Id. at 6a (citation omitted). And the court noted that the "continuing nature" of a Section 1326(a) "'found in'" offense "is nearly universally recognized" by other courts of appeals. Ibid. (citation omitted) (collecting cases).

The court of appeals accordingly determined that "a violation of § 1326(a) may be prosecuted not only where the defendant enters or attempts to enter the United States but also at any place that he is present thereafter until he is found." Pet. App. 7a. And the court observed that the offense charged here "began at some unknown point in time and place after [petitioner]'s removal when he reentered the United States without permission, and it continued

thereafter until he was ultimately found and apprehended in Pennsylvania." Ibid. (emphasis omitted). The court found that venue was therefore proper "in the Eastern District of Virginia, where [petitioner] was present during his continuing violation of § 1326(a)." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 13-17) the Eastern District of Virginia was not a permissible venue for the offense charged. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. The court of appeals correctly recognized that venue was proper in the Eastern District of Virginia. Pet. App. 4a-7a.

Under 8 U.S.C. 1329, a prosecution under 8 U.S.C. 1326 "may be instituted at any place in the United States at which the violation may occur or at which the person charged * * * may be apprehended." 8 U.S.C. 1329. Section 1326(a), in turn, authorizes punishment for a noncitizen like petitioner who has previously been removed and "enters, attempts to enter, or is at any time found in, the United States," unless he has received express consent to reapply for admission. 8 U.S.C. 1326(a)(2); see 8 U.S.C. 1326(a).*

* This brief uses "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

As the court of appeals observed, it is "nearly universally recognized" that a violation of Section 1326(a) like petitioner's is a "continuing offense, which begins with a previously deported alien's reentry (or attempted reentry) into the United States and continues until the alien is found." Pet. App 6a; see ibid. (citing United States v. Hernandez-Gonzalez, 495 F.3d 55, 61-62 (3d Cir.), cert. denied, 552 U.S. 1054 (2007); United States v. Santana-Castellano, 74 F.3d 593, 598 (5th Cir.), cert. denied, 517 U.S. 1228 (1996); United States v. Jimenez, 605 F.3d 415, 422 (6th Cir. 2010); United States v. Rivera-Mendoza, 682 F.3d 730, 733 (8th Cir. 2012); United States v. Ruelas-Arreguin, 219 F.3d 1056, 1061 (9th Cir.), cert. denied, 531 U.S. 1024 (2000); United States v. Scott, 447 F.3d 1365, 1369 (11th Cir. 2006); United States v. Mendez-Cruz, 329 F.3d 885, 889 (D.C. Cir. 2003)); see also United States v. Villarreal-Ortiz, 553 F.3d 1326, 1330 (10th Cir. 2009).

As the court of appeals explained, the "continuing nature" of such a Section 1326(a) offense "follows from the operative language of § 1326(a), which punishes the conduct of a previously deported alien who 'enters [or] attempts to enter' the United States until 'at any time,' he is 'found in the United States' as a result of the entry." Pet. App. 6a (brackets omitted); accord, e.g., United States v. Are, 498 F.3d 460, 464 (7th Cir. 2007). The statutory text thus describes an offense that commences when the noncitizen illegally reenters the country, not just a discrete offense that

takes place only when the defendant is "found in" the United States by immigration authorities. See United States v. Corro-Balbuena, 187 F.3d 483, 485 (5th Cir. 1999); Ruelas-Arreguin, 219 F.3d at 1061; see also United States v. Lopez-Flores, 275 F.3d 661, 663 (7th Cir. 2001). And because such a violation of Section 1326(a) is a continuing offense, the offense "occur[s]," 8 U.S.C. 1329, and thus "[v]enue may lie[,] in any district in which the continuing conduct occurred" -- i.e., any district to or through which the unlawful-reentry defendant traveled. Ruelas-Arreguin, 219 F.3d at 1061 (citation and internal quotation marks omitted); see Rodriguez-Rodriguez, 453 F.3d at 460; Ruelas-Arreguin, 219 F.3d at 1062; see also United States v. Cores, 356 U.S. 405, 408 (1958) (explaining that, "if the Congress is found to have created a continuing offense, 'the locality of the crime shall extend over the whole area through which force propelled by an offender operates'" (brackets and citation omitted)).

As the court of appeals observed, 18 U.S.C. 3237(a) reinforces the permissibility of prosecution in such a venue. Pet. App. 5a. Section 3237(a) provides in part that, "[e]xcept as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. 3237(a). Thus, "when a violation occurs in more than one district -- such as where the

elements of the offense are satisfied in different districts or where the offense by its nature is a continuing offense -- venue is appropriate in any district in which the violation 'was begun, continued, or completed.'" Pet. App. 5a (quoting 18 U.S.C. 3237(a)). And Section 3237(a)'s further specification that "[a]ny offense involving * * * the importation of [a] * * * person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such * * * person moves," 18 U.S.C. 3237(a), strongly corroborates the continuing-offense nature of a Section 1326(a) violation like petitioner's.

Here, as the court of appeals explained, petitioner's offense "began at some unknown point in time and place after [his] removal when he reentered the United States without permission." Pet. App. 7a (emphasis omitted). He therefore "was appropriately prosecuted in the Eastern District of Virginia, where he was present during his continuing violation of § 1326(a)." Ibid.

b. Petitioner's contrary arguments lack merit.

Petitioner contends (Pet. 13-16) that Section 1329 limits venue for an illegal-reentry defendant "found in" a particular district solely to that district. That contention lacks merit. Section 1329 provides for venue in "any" district where the violation "occur[red]" or where the defendant was "apprehended." 8 U.S.C. 1329. It thus includes the district where the defendant

is discovered by immigration authorities with "knowledge of the illegality of his presence," Santana-Castellano, 74 F.3d at 598, but does not exclude other districts in which the continuing offense may also have "occur[red]," 8 U.S.C. 1329; see pp. 10-11, supra. "The crime is being in the United States and is not limited to the instant at which" the noncitizen is ultimately "found" by immigration authorities. Rodriguez-Rodriguez, 453 F.3d at 460. The noncitizen "commits the offense wherever he goes." Ibid.

Even if Sections 1326(a) and 1329 left any uncertainty, 18 U.S.C. 3237(a) eliminates it. See pp. 11-12, supra. Petitioner errs in contending (Pet. 13 n.11) that Section 1329 has displaced Section 3237(a) in this context. By its terms, Section 1329 does not prescribe the exclusive permissible venue for a Section 1326 prosecution. It instead permissively states that prosecutions under Section 1326 (and other provisions) "may be instituted at any place in the United States at which the violation may occur." 8 U.S.C. 1329(a) (emphasis added). Petitioner observes that Section 3237(a) applies only "except as otherwise expressly provided by enactment of Congress." Pet. 13 n.11 (brackets omitted). But Section 1329 does not "expressly provide[]" that the venue identified in Section 3237(a) is unavailable for prosecutions under Section 1326, and in any event, the substance of "§ 1329 does not conflict with § 3237(a)." Ruelas-Arreguin, 219 F.3d at 1062. Section 1329 provides that venue lies in any district where the offense "occur[red]," 8 U.S.C. 1329, while

Section 3237 congruently provides that venue lies in any district where the ongoing offense "was committed," 18 U.S.C. 3237(a). And even if the two provisions could be deemed to differ, any difference has no practical significance in this case because the Eastern District of Virginia was a permissible venue under either statute.

2. Petitioner contends (Pet. 6-12) that review is warranted to resolve a conflict among the courts of appeals regarding "where a 'found in' violation of § 1326 occurs." That contention lacks merit.

As the court of appeals observed, "th[e] continuing nature of the offense" for a Section 1326(a) violation like petitioner's "is nearly universally recognized." Pet. App. 6a. As petitioner acknowledges (Pet. 6-7), the Seventh and Ninth Circuits have recognized, like the decision below, that the continuing nature of such a violation makes venue proper in any district where the ongoing offense occurs. See Rodriguez-Rodriguez, 453 F.3d at 461 (holding that "venue may be laid wherever the alien is located in fact, and as often as he is located"); Ruelas-Arreguin, 219 F.3d at 1062 ("Because a violation of 8 U.S.C. § 1326 for being 'found in' the United States without the Attorney General's permission is a continuing offense which commences with entry and concludes with discovery, venue was proper in either" the district where the defendant entered illegally or the district where he was discovered by immigration authorities.). Petitioner does not identify any

decision of another court of appeals that has held to the contrary. Although petitioner cites (Pet. 8-10) decisions of four other courts of appeals, none addressed a question of venue, and none is inconsistent with the decision below.

Petitioner errs in asserting (Pet. 8-9) that the decision below conflicts with the First Circuit's decisions in United States v. Cuevas, 75 F.3d 778 (1996), and United States v. DeLeon, 444 F.3d 41 (2006). In those cases, the court determined that a Section 1326(a) violation is occurring for Sentencing Guidelines (Cuevas) or statute-of-limitations (DeLeon) purposes when the defendant is "found" through discovery of his presence within the United States by immigration officials aware of his identity and status. See DeLeon, 444 F.3d at 51-53; Cuevas, 75 F.3d at 784. Neither decision is inconsistent with recognizing that an offense like petitioner's begins at an earlier point, continues thereafter, and allows for prosecution in any district that the defendant visited during that period.

Petitioner similarly errs in contending (Pet. 9) that the decision below conflicts with the Second Circuit's decision in United States v. Rivera-Ventura, 72 F.3d 277 (1995), which also concerned a statute-of-limitations issue, see id. at 279. That decision concerned the distinct question of when the statute of limitations begins to run when a noncitizen "whom the authorities have once taken into custody with knowledge of the illegality of his presence" absconds and is later rearrested by federal

authorities. Id. at 282; see id. at 279-285. The court reasoned that, "in absconding, [the defendant] tolled the running of the five-year limitations period in accordance with the provision in 18 U.S.C § 3290 that 'no statute of limitations shall extend to any person fleeing from justice.'" Id. at 282 (brackets omitted). Although the court rejected the district court's alternative rationale -- which was premised on the possibility that the offense continues past the point at which the defendant is initially "found" to include subsequent occasions on which he is "found" -- it acknowledged that Section 1326's "found in" "provision is the practical equivalent of making unlawful 'entry' a continuing offense until at least such time as the alien is located." Ibid. And the court deemed it "more likely that the 'found in' clause was included to make it clear that if an alien illegally reenters the United States after deportation, he is subject to prosecution even if the government does not discover him or the illegality of his entry until after the time to prosecute him for illegal entry has expired." Ibid. Moreover, the Second Circuit has subsequently clarified that the statements made in Rivera-Ventura on which petitioner relies were dicta. See United States v. Morgan, 380 F.3d 698, 702 & n.3 (2004) ("Because our observations to the effect that being 'found' is not a continuing offense had no role in our judgment, which was to affirm the conviction by reason of the tolling of the statute, this discussion cannot be characterized as any part of our holding in Rivera-Ventura.").

For similar reasons, petitioner is also incorrect in contending (Pet. 9) that the decision below conflicts with the Third Circuit's decision in United States v. DiSantillo, 615 F.2d 128 (1980), which similarly involved a question of "whether the statute of limitations had run prior to return of the indictment," id. at 130. The Third Circuit there concluded that a noncitizen "may not be indicted under § 1326 more than five years after he entered or attempted to enter the United States through an official [U.S.] port of entry when the immigration authorities have a record of when he entered or attempted to enter." Id. at 137. The court made clear, however, that "[i]f no record is possible because the entry was surreptitious and not through an official port of entry, the alien is 'found' when his presence is first noted by the immigration authorities." Ibid. And although the court stated that "the crime of illegal entry through a recognized [U.S.] port of entry after being arrested and deported is not a continuing offense," id. at 136, it has subsequently explained that "DiSantillo's holding [is] limited to the statute of limitations context where immigration authorities were aware of the entry." Hernandez-Gonzalez, 495 F.3d at 59; see id. at 61 ("All the courts to address the question have held that at least in the case of surreptitious reentry, as in this case, the 'found in' offense is first committed at the time of the reentry and continues to the time when the defendant is arrested for the offense. This is clearly correct." (citation omitted)).

Finally, petitioner errs in asserting (Pet. 10) that the decision below conflicts with the Eleventh Circuit's decision in United States v. Canals-Jimenez, 943 F.2d 1284 (1991). Canals-Jimenez did not involve a venue challenge, but rather a claim that the "government failed to prove beyond a reasonable doubt that the defendant was 'found in' the United States in violation of the law." Id. at 1285. In sustaining that claim, the court stated "that 'found in' in Section 1326 applies only to situations in which an alien is discovered in the United States after entering the country surreptitiously by bypassing recognized immigration ports of entry." Id. at 1288. That statement, however, does not conflict with the decision below, and the Eleventh Circuit has explicitly held "that a ['found in'] violation of § 1326 is a continuing offense that can run over a long period of time, as the offense conduct begins when the alien illegally enters the United States and continues until the alien is actually 'found' by immigration authorities." Scott, 447 F.3d at 1369. Petitioner's failure to identify any decision of the Eleventh or any other Circuit addressing and granting relief on a distinct claim like his confirms that further review is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

PAUL T. CRANE
Attorney

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