No. _____

IN THE
Supreme Court of the United States

ESTEBAN FIGUEROA-LARREA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the district court plainly erred by misadvising the jury about the legal scope of the sole contested element at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OPINION BELOW

The unpublished memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix. *See* Pet. App. 1a–5a.

JURISDICTION

The court of appeals entered judgment on June 20, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Petitioner was born in 1981 in Mexico. As a toddler, his mother brought him and his six siblings to the United States. He grew up in a bad neighborhood in Los Angeles. He had no father figure in his life. Petitioner struggled from a young age, and he masked those struggles with substance abuse. He began drinking alcohol at age 10, smoking marijuana at 12, snorting cocaine at 16, and using hallucinogens at 18.

The drug and alcohol dependence predictably, and tragically, led Petitioner to make bad decisions, including stealing a car in 2003, when he was 21. That incident led to a robbery conviction and a prison sentence. Following his conviction, the government deported him to Mexico.

2. Over the next decade, Petitioner bounced between Mexico and the United States, and his drug addiction worsened. He became a habitual drinker and regularly used methamphetamine, cocaine, and marijuana.

In late 2017, about two years before the events that led to this prosecution, Petitioner lived in Mexico. On August 24th of that year, he went to the pedestrian lane of the San Ysidro Port of Entry at Mexico's border with California. There, an immigration officer inspected Petitioner. Petitioner told the immigration officer that he was a U.S. citizen. He also claimed that his name was Emmanuel (rather than Esteban) Figueroa and that he was born in Los Angeles. According to the immigration officer, Petitioner did not appear to be "under the influence of drugs or alcohol" when they interacted. But Petitioner explained to a different immigration officer that he had consumed four forty-ounce beers—roughly a gallon of beer—the night before. He had also recently used methamphetamine and marijuana. That same officer also believed that Petitioner did not "appear to be under the influence of alcohol or narcotics."

After his arrest, the government brought Petitioner to Alvarado Parkway Institute—a drug-rehabilitation center. There, his toxicology report confirmed that he had methamphetamine, amphetamine, and marijuana in his system. After six days, doctors discharged him and diagnosed him with a substance-abuse problem: "alcohol dependence, other stimulant dependence, and cannabis dependence."

A few months later in December 2017, the government ordered Petitioner removed to Mexico.

Four months later, Petitioner tried to return to the United States. He again went to the San Ysidro Port of Entry. He tried to "walk[]" through the port. He

planned to go to Los Angeles. The record does not make clear how he tried to enter. In any event, the government arrested him and removed him to Mexico in April 2018.

3. The incident that led to this prosecution occurred about two months later, on June 11, 2018, at about 7:30 in the evening. Petitioner returned to the pedestrian lane of the San Ysidro Port of Entry. He dressed himself in heavy clothes, including a long-sleeved shirt. He had a backpack, a plastic bag, and a suitcase. As Petitioner walked, his property tumbled out the side of the suitcase. He also had a towel wrapped around his neck. His Mexican birth certificate was among his belongings.

When Petitioner arrived at the port, he spoke to an immigration officer at a booth inside the primary-inspection building. He told the officer his name was Emmanuel. He said he was a U.S. citizen, born in Los Angeles. In short, he said something like what he said previously that led to his arrest and removal less than a year earlier. During his interaction with the primary-booth agent, Petitioner continually wiped his face with a towel.

Like before, because the immigration officer could not verify Petitioner's information, the officer sent him to secondary inspection for more processing. About three hours later, a different set of immigration officers interviewed Petitioner. The officers recorded the interview on video and conducted it almost entirely in Spanish. The interview lasted about 19 minutes. During the interview, Petitioner detailed

his significant drug and alcohol usage. He told the officers that he consumed about five or more bottles of beer and liquor per day, including about four 40-ounce beers per day. He said he smoked two pipes of methamphetamine per day. He said he used marijuana every day. He also said that he snorted heroin. And he said that he snorted about eight lines of cocaine per day, although he explained that he hadn't used cocaine in three or four days. According to the agent, Petitioner still "appear[ed]" to be alert and coherent, and the officer believed Petitioner answered questions in a rational manner. The officer did not think Petitioner "appear[ed]" to be under the influence of alcohol or narcotics. At one point, unprompted, Petitioner said that, "if [he] crossed, [h]e would run like Forrest Gump." After the agents asked Petitioner if he had anyone to pick up his property, he called his mother, told her he tried to cross and asked her to pick up his belongings.

After placing Petitioner under arrest, the officers transported him to a local detention facility. The facility rejected him, however, because of his self-reported use of alcohol and drugs. The government then took Petitioner to the Alvarado Parkway Institute, the same place that the government had brought him to detox in 2017. He was admitted for alcohol withdrawal as well as alcohol, heroin, cannabis, and methamphetamine abuse. According to a toxicology report done about twenty hours after Petitioner approached the port, he tested positive for methamphetamine, amphetamine, and marijuana. He did not test positive for cocaine, which tends to metabolize quickly.

When Petitioner arrived at Alvarado, doctors noticed that he appeared disheveled, with "compromised grooming and hygiene." He "presented with disorganized thoughts and was experiencing auditory hallucinations and visual hallucinations." According to the doctors, Petitioner was "out of touch with reality" when admitted. He falsely believed he had family members waiting at the facility for him and reported hearing their voices. He also believed that there were people "coming out of the walls."

The government held Petitioner at Alvarado for six days. When the doctors discharged him, they diagnosed him as having "alcohol dependence with withdrawal, methamphetamine dependence, cannabis dependence, nicotine dependence, and cocaine abuse." Doctors prescribed him an anti-psychotic medication as well as a drug to help with the alcohol detox.

4. After Petitioner detoxed at Alvarado, the government charged him with attempted illegal reentry, a felony under 8 U.S.C. § 1326. In relevant part, that statute makes it a felony for a previously removed "alien" to "attempt[] to enter . . . the United States" without the "express[] consent[]" of the Attorney General to reapply for admission.

On the day of trial, the district court discussed the jury instructions. Both parties had recommended the Ninth Circuit's model jury instruction for the elements of attempted illegal reentry, and the court chose to use them. Thus, the

court determined that it would instruct the jury that the charged offense had five elements, including one intent element:

> First, the defendant was removed from the United States;
>
> *Second, the defendant had the specific intent to enter the United States free from official restraint;*
>
> Third, the defendant was an alien at the time of the defendant's attempted reentry into the United States;
>
> Fourth, the defendant had not obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admissions into the United States; and
>
> Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

ER486 (emphasis added).

5. At trial, Petitioner's defense was that he was so intoxicated at the port of entry that he could not form the intent to enter the United States. The jury, however, convicted Petitioner, and the district court imposed a 77-month sentence.

6. On appeal, Petitioner argued that the district court had misinstructed the jury on the intent element of attempted illegal reentry, the sole element in dispute. Petitioner explained that a defendant did not commit attempted illegal reentry unless he intended to enter the country *without the necessary permission from the Attorney General*, something the Ninth Circuit had previously held in cases like *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc). The district court, however, had instructed the jury that Petitioner had

the requisite intent to commit attempted illegal reentry if he had just intended to enter the United States. Petitioner explained that a properly instructed jury would have likely acquitted him because he produced significant evidence that he genuinely believed he was a U.S. citizen and thus believed he had the required permission to enter.

The court of appeals affirmed. It first held that plain-error review applied to Petitioner's claim because he had failed to object to the relevant jury instruction. Pet. App. 3a. The court then agreed that the jury had been misinstructed on the intent element. "[O]ur case law," the court of appeals wrote, "establishes that the jury was . . . required to find that the defendant had the specific intent to enter 'without consent.'" Pet. App. 4a (quoting *Gracidas-Ulibarry*, 231 F.3d at 1198). The court held, however, that because some of its case law had "summarize[d]" the intent element of attempted illegal reentry without including the "without consent" requirement, the law was "less than obvious." Pet. App. 4a. Petitioner therefore could meet the "plain" prong of plain-error review. Pet. App. 4a. The court also held that the error "did not likely affect [Petitioner's] substantial rights because there is 'strong and convincing evidence that the missing element of the crime had been adequately proved by the prosecution.'" Pet. App. 4a (quoting *United States v. Alferahin*, 433 F.3d 1148, 1158 (9th Cir. 2006)).

REASONS FOR GRANTING THE PETITION

The district court reversibly erred by failing to properly instruct the jury on the intent element of the charged offense. The jury should have been instructed that

the government needed to prove beyond a reasonable doubt that Petitioner did not genuinely believe he was a U.S. citizen. Though plain-error review applies to this claim, Petitioner can meet that standard. Still, the court of appeals rejected Petitioner's argument and affirmed his conviction. Given the fundamental nature of the lower court's error, this is the rare case in which this Court should grant review for error-correction purposes.

I. The district court committed error.

To begin with, as even the court of appeals held, Pet. App. 4a, the district court committed "error" when it instructed the jury that the government only needed to prove that Petitioner had the intent to enter the United States to convict him of attempted illegal reentry. *United States v. Marcus*, 560 U.S. 258, 262 (2010). The first prong of plain-error review is therefore met. *See id.*

About two decades ago, the Ninth Circuit sitting en banc articulated the intent element that the government needed to prove to convict a defendant of attempted illegal reentry. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000) (en banc). In *Gracidas-Ulibarry*, the court held that the government had to prove 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. Since *Gracidas-Ulibarry*, the Ninth Circuit has continually affirmed that an element of attempted illegal reentry is that the defendant had the intent to reenter "without consent." *See*, *e.g.*, *United States v. Vazquez-Hernandez*, 849 F.3d 1219,

1225 (9th Cir. 2017) (holding that "attempted illegal reentry" requires the government to prove that the "defendant had the 'specific intent to reenter without consent'"); *United States v. Argueta-Rosales*, 819 F.3d 1149, 1155 (9th Cir. 2016) (same); *United States v. Rosales-Aguilar*, 818 F.3d 965, 971 (9th Cir. 2016) (same); *United States v. Lombera-Valdovinos*, 429 F.3d 927, 929 (9th Cir. 2005) (same); *United States v. Smith-Baltiher*, 424 F.3d 913, 923 (9th Cir. 2005) (same); *United States v. Leos-Maldonado*, 302 F.3d 1061, 1063 (9th Cir. 2002) (same).

The "without consent" requirement means that the government must prove that the defendant believed "that he did not need permission to enter" the United States. *Smith-Baltiher*, 424 F.3d at 923. Thus, if a defendant can raise a reasonable doubt about whether he had a "mistake of fact as to whether he had permission to reenter the United States," the government has not proven its case. *United States v. Hernandez*, 504 F. App'x 647, 648 (9th Cir. 2013). That means, for example, if the defendant believes that he is a U.S. citizen, the defendant has not purposefully tried to enter the United States without consent. *Smith-Baltiher*, 424 F.3d at 923–25.

In this case, the district court advised the jury that Petitioner had the requisite intent to commit attempted illegal reentry if the government proved that he had the "intent to enter the United States free from official restraint." ER485. That's it. The instruction does not require the government to prove that the defendant intended to enter "without consent," as the law requires. *E.g.*, *Vazquez-Hernandez*, 849 F.3d at 1225. Thus, the jury instructions used in this case "do not

adequately link the intent element of [the charged] crime with the required object of that intent. *Id.* at 1225. Petitioner can therefore establish the first prong of plain-error review: error occurred. *See Marcus*, 560 U.S. at 262; Pet. App. 4a.

II. The district court's error was clear obvious.

Petitioner can also meet the second prong of plain-error review: he can show that the error was plain—that is, the error was "clear or obvious, rather than subject to reasonable dispute." *Marcus*, 560 U.S. at 262. Petitioner could point to multiple cases directly on point establishing the without-consent requirement, including an en banc case. *See Gracidas-Ulibarry*, 231 F.3d at 1196.

Still, the court of appeals held that Petitioner could not establish that the law was clear. But the court did so by noting that three Ninth Circuit cases had in places "summarize[d]" the intent element of attempted illegal reentry without including the "without consent" requirement. Pet. App. 4a (citing *Lombera-Valdovinos*, 429 F.3d at 929; *Vazquez-Hernandez*, 849 F.3d at 1225; *Argueta-Rosales*, 819 F.3d at 1156.) That is, the court—in cases not involving the "without consent" portion of the intent element of attempted illegal reentry—summarized the court's case law without mentioning that part of the intent element. *See Lombera-Valdovinos*, 429 F.3d at 929; *Vazquez-Hernandez*, 849 F.3d at 1225; *Argueta-Rosales*, 819 F.3d at 1156.

The mere fact that some cases—in dicta—had "summarize[d]" the intent element without including the without consistent requirement didn't muddy up the

law. Pet. App. 4a. The point of the "plain" requirement is to allow courts to correct errors that are "so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of an objection." *Henderson v. United States*, 568 U.S. 266, 277 (2013). No competent district judge has doubts about whether an en banc case remains good law because in later cases some panels "summarize[d]" the case law in a way inconsistent with the en banc case. Pet. App. 4a. Competent judges follow on-point holdings from en banc courts.

III. The district court's error affected Petitioner's substantial rights.

Petitioner can also establish the third prong of plain-error review: the court's "error affected [Petitioner's] substantial rights[.]" *Marcus*, 560 U.S. at 262.

When a court does not instruct the jury on all the elements of the charged offense, the jury did not make all the findings necessary to convict the defendant of the charged offense. That is, because the court did not properly instruct the jury on the elements of the crime, Petitioner "was not convicted of" attempted illegal reentry; "rather, he was convicted of only some of the elements of that crime." *Alferahin*, 433 F.3d at 1157. To be sure, the "omission of an element from jury instructions does not always 'affect' a defendant's substantial rights and the failure to submit an element to the jury is not *per se* prejudicial." *Id.* (citing *Neder v. United States*, 527 U.S. 1, 15 (1999)). But a defendant's substantial rights will be violated unless the government introduced significant, unrebutted evidence that the element (or portion of the element) was met. *See id.* (listing cases). For example, in *Neder*,

this Court held that the district court's failure to instruct the jury on an element of was harmless only because "the government's evidence 'incontrovertibly established[d]" the missing element. 527 U.S. at 16.

Here, the evidence about whether Petitioner had the conscious desire to enter without the proper permission is debatable. On one hand, there is evidence in the record to suggest that Petitioner could have erroneously believed that he had permission to come to the United States. He came to the port of entry. He said he believed he was a U.S. citizen. He claimed to be born in Los Angeles (the place where he did in fact grow up). He made no statements after his arrest affirming that he knew he wasn't a U.S. citizen or that he knew he didn't have permission to enter. On the other hand, Petitioner had previously admitted during prior crossings that he was not a U.S. citizen and that he knew he did not have permission to reenter the United States. He also had a Mexican birth certificate on him.

Given that mix of evidence, it is plausible that when Petitioner, intoxicated and delusional, came to the port that day, he genuinely believed that he had permission to come to the United States. Indeed, it is not difficult to believe that someone who reported seeing people "coming out of the walls," and who believed falsely that family members were present, might also genuinely (though incorrectly) believe that he was a U.S. citizen or otherwise had consent to come to the United States. Put differently, if Petitioner was "out of touch with reality" when he got to the port of entry (like he was when he was at Alvarado), it is not unreasonable to

infer that he genuinely believed he was born in Los Angeles and thus a U.S. citizen. At the least, then, the evidence that Petitioner knew he lacked consent to reenter was debatable.

In disagreeing, the court of appeals summarily claimed that "there is 'strong and convincing evidence that the missing element of the crime had been adequately proved by the prosecution.'" Pet. App. 4a (quoting *Alferahin*, 433 F.3d at 1158). But that isn't the right standard. The question in this context is whether the evidence "'incontrovertibly established[d]" the missing element. *Neder*, 527 U.S. at 16. And, for the reasons just explained, there wasn't.

IV. The district court's error seriously affected the fairness, integrity, and public reputation of judicial proceedings.

Finally, though the court of appeals didn't reach the issue, the court's error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Marcus*, 560 U.S. at 262. The court's instructional error "'improperly deprived [Petitioner] of his right to have a jury determine an essential element' of the offense: [his] 'mental state.'" *United States v. Ornelas*, 906 F.3d 1138, 1146 (9th Cir. 2018) (internal quotation marks omitted). Not correcting this sort of fundamental, constitutional error would cause a "'miscarriage of justice.'" *Id.* (internal quotation m arks omitted); *see also Alferahin*, 433 F.3d at 1159–60 (holding that it would exercise its discretion to correct an error where the district court improperly instructed the jury on an element of the charged offense).

* * *

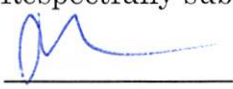
In sum, the court of appeals erred by affirming Petitioner's conviction, and he asks that this Court grant review to correct that error. This is the rare case in which this Court should grant review for purposes of error correction.

CONCLUSION

The petition for a writ of certiorari should be granted.

July 19, 2021

Respectfully submitted,



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