Supreme Court, U.S.
FILED

07-1669 JUN 23 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 07-

IN THE

Supreme Court of the United States

CARL GORDON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MATTHEW M. SHORS
DAVID J.L. MORTLOCK
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

GABRIEL BANKIER PLOTKIN
Counsel of Record
DANIEL M. FEENEY
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street, Suite 3600
Chicago, IL 60601
(312) 263-3700

Counsel for Petitioner

QUESTION PRESENTED

The federal illegal reentry statute makes it a crime for a previously-deported alien "at any time to be found in the United States." 8 U.S.C. § 1326(a)(2). The statute of limitations for noncapital federal offenses is five years. 18 U.S.C. § 3282(a).

Petitioner, who was previously deported, presented his own green card to immigration authorities at the San Ysidro, California port of entry in 1995. Although invalid, the green card contained his accurate identifying information. Authorities inspected Petitioner and admitted him into the United States. He was not indicted for being "found in" the United States until 2006. The Court of Appeals held that the indictment was timely because the government's constructive knowledge of an alien's illegal presence does not start the statute of limitations period.

The question presented is whether the five year statute of limitations for the crime of being "found in" the United States began to run in 1995 at the time that Petitioner announced his presence and true identity to immigration authorities at the border.

PARTIES TO THE PROCEEDING

Petitioner is Carl Gordon, defendant-appellant below.

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

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. Factual Background 3

B. Trial Court 4

C. Court of Appeals 6

REASONS FOR GRANTING THE WRIT 9

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A STATUTE OF LIMITATIONS FOR THE CRIME OF BEING "FOUND IN" THE UNITED STATES BEGINS TO RUN WHEN THE GOVERNMENT HAS CONSTRUCTIVE KNOWLEDGE OF AN ALIEN'S ILLEGAL PRESENCE IN THE COUNTRY. 9

II. THE DECISION BELOW IS INCONSISTENT WITH THE PLAIN LANGUAGE OF 8 U.S.C § 1326, DEPRIVES DEFENDANTS OF THE PROTECTION OF THE STATUTE OF LIMITATIONS, AND ENCOURAGES NEGLIGENCE BY LAW ENFORCEMENT..... 12

TABLE OF CONTENTS (continued)

	Page
CONCLUSION	17
APPENDIX	1a
A. Seventh Circuit Opinion	1a
B. District Court Opinion and Order	21a
C. Seventh Circuit Order Denying Rehearing *En Banc*	33a
D. District Court Judgment	34a

TABLE OF AUTHORITIES

Page(s)

CASES

Cent. Trust Co. v. Official Creditor's Comm. of Geiger Enters., Inc.,
454 U.S. 354 (1982)..14

Toussie v. United States,
397 U.S. 112 (1970)..*passim*

United States v. Are,
498 F.3d 460 (7th Cir. 2007)..6

United States v. Bencomo-Castillo,
176 F.3d 1300 (10th Cir. 1999)........................15, 16

United States v. Canals-Jimenez,
943 F.2d 1284 (11th Cir. 1991)..............................16

United States v. Clarke,
312 F.3d 1343 (11th Cir. 2002)..........................8, 10

United States v. DiSantillo,
615 F.2d 128 (3d Cir. 1980)..............................8, 10

United States v. Gomez,
38 F.3d 1031 (8th Cir. 1994)..............................8, 10

United States v. Gordon,
513 F.3d 659 (7th Cir. 2008)........................*passim*

United States v. Hernandez,
189 F.3d 785 (9th Cir. 1999)............................14, 15

United States v. Herrera-Ordones,
190 F.3d 504 (7th Cir. 1999)..................................15

United States v. Lennon,
372 F.3d 535 (3d Cir. 2004)..............................8, 14

TABLE OF AUTHORITIES
(Continued)

Page(s)

United States v. Mendoza-Lopez,
481 U.S. 828 (1987) 16

United States v. Meraz-Valeta,
26 F.3d 992 (10th Cir. 1994) 15

United States v. Rivera-Ventura,
72 F.3d 277 (2d Cir. 1995) 8, 10

United States v. Rodriguez-Rodriguez,
453 F.3d 458 (7th Cir. 2006) 15

United States v. Santana-Castellano,
74 F.3d 593 (5th Cir. 1996) 8, 10

United States v. Whittaker,
99 F.2d 38 (2d Cir. 1993) 15

STATUTES AND REGULATIONS

8 U.S.C. § 1326 .... *passim*

18 U.S.C. § 3282 .... *passim*

18 U.S.C. § 3284 14

U.S.S.G. § 2B1.1 11

U.S.S.G. § 2D1.1 11

U.S.S.G. § 2K2.1 11

U.S.S.G. § 2L1.1 11

U.S.S.G. § 2L1.2 11

TABLE OF AUTHORITIES
(Continued)

Page(s)

OTHER AUTHORITIES

http://trac.syr.edu/tracreports/bulletins/overall/monthly feb08/fil/ http://trac.syr.edu/tracreports/bulletins/immigration/monthlyjun06 .... 11, 12

Merriam Webster's College Dictionary, Tenth Edition (1997) 14

U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics, Fiscal Year 2007, Table 17: Offenders Sentenced for Each Chapter Two Guideline 11

Petitioner Carl Gordon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Seventh Circuit, issued on January 16, 2008, can be found at 513 F.3d 659. (App. 1a.) The Court of Appeals' order denying petition for rehearing *en banc* is unreported and reproduced in the appendix. (App. 33a.) The U.S. District Court for the Northern District of Illinois issued its memorandum opinion and order on August 3, 2006. (App. 21a.)

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment and opinion issued on January 16, 2008, by the United States Court of Appeals for the Seventh Circuit. That court denied petitioner's request for a rehearing *en banc* in an order dated March 24, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

8 U.S.C. § 1326(a) provides in relevant part that any alien who "(1) has been denied admission, excluded, deported, or removed . . . and thereafter (2) enters, attempts to enter, or is at any time found in, the United States [without the consent of the Attorney General] shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both."[1]

18 U.S.C. § 3282(a) provides in relevant part that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found

---

[1] The statutory maximum penalty increases to 20 years if the alien was removed subsequent to an aggravated felony conviction. 18 U.S.C. § 1326(b)(2).

or the information is instituted within five years next after such offense shall have been committed."

STATEMENT OF THE CASE

This case involves the intersection of the federal illegal reentry statute, 8 U.S.C. § 1326, and the five-year federal statute of limitations for non-capital offenses, 18 U.S.C. § 3282. Specifically, it involves that portion of the federal illegal reentry statute making it a crime for an alien who has previously been deported "at any time to be found in the United States." 8 U.S.C. § 1326(a)(2).

This Court's review is necessary to address a split among the courts of appeals that the Court of Appeals for the Seventh Circuit created when it departed from the uniform holdings of five other circuit courts.

The unique conclusion of the Court of Appeals for the Seventh Circuit is that the offense of being "found in" the United States is a continuing offense that lasts as long as an illegal alien remains in the country, even when the government reasonably should know of the alien's illegal return. The court therefore held that the statute of limitations did not begin to run in this case when Petitioner presented himself to immigration authorities with a green card containing accurate identifying information. The court's conclusion effectively eliminates the statute of limitations in all "found in" prosecutions by essentially holding that nothing short of the government's decision to arrest or prosecute an offender will trigger the statute of limitations.

The five other courts of appeals to address the issue, by contrast, have held that the offense of being "found in" the United States is complete, and the statute of limitations is triggered, at an objectively determined point of discovery: the moment

immigration authorities know *or reasonably should know* that a previously deported alien has illegally reentered the United States. Unlike the law in the Seventh Circuit, the law in these five circuits is consistent with the plain language of the illegal reentry statute and the language of the statute of limitations. It also is consistent with the many holdings of this Court confirming that statutes are to be construed so as to serve the purposes of repose—prompt investigation of suspected criminal activity and protection from charges for conduct in the far-distant past—and that continuing offenses are disfavored. *See Toussie v. United States*, 397 U.S. 112, 114-15 (1970).

This Court's review is important because the crime in question is the second most prosecuted crime in the United States. Significant numbers of "found in" prosecutions are brought throughout the country and in all twelve geographic circuits. The question presented by this petition will thus continue to arise throughout the federal courts. The circuits' divergent interpretations of the statute will result in the inconsistent application of the law to the numerous defendants that are subject to it.

A. Factual Background

Petitioner Carl Gordon was deported from the United States in 1990 after he was convicted of a felony offense. He was returned to his native country of Belize. (App. 2a.)

In November 1995, Mr. Gordon returned to the United States through the official port of entry at San Ysidro, California. He arrived at the border in a car and presented immigration officials with his own authentic green card—a document bearing his true name, date of birth, photograph, alien registration

number, and fingerprint. The green card was invalid as a result of his previous deportation, but it had not been taken from him. (App. 2a.)

Mr. Gordon should have been turned away at the border because of his prior deportation. Immigration authorities had access to this information at the San Ysidro border crossing; INS border inspectors had a computer database and lookout book available at the border that would have identified Mr. Gordon as a previously deported alien without permission to reenter. Nevertheless, immigration officials looked at his green card, inspected Mr. Gordon, and admitted him into the United States.

On August 10, 2001, Mr. Gordon entered the custody of the Illinois Department of Corrections after being convicted of a burglary that took place the previous year. (*Id.*) The federal government claimed that it did not learn Mr. Gordon was illegally in the United States until April 21, 2006, when he was interviewed by an agent of the INS prior to his release from state prison. (App. 2a-3a.)

B. Trial Court

On May 9, 2006, nearly eleven years after Mr. Gordon identified himself to immigration authorities at the San Ysidro border crossing and entered the country, the United States Attorney's Office for the Northern District of Illinois filed an indictment charging Mr. Gordon with illegal reentry, in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2). (App. 3a.) The government alleged that Mr. Gordon, an alien who had been previously deported, had been found in the United States without having previously obtained the express consent of the Attorney General for reapplication for admission into the United States. (*Id.*)

Mr. Gordon moved to dismiss the indictment because it had been filed after the expiration of the five-year statute of limitations set forth in 18 U.S.C. § 3282. (*Id.*) Citing case law from five other circuits, he argued that the five-year period began to run on the date he presented himself at the border because immigration authorities, exercising the level of diligence typical of law enforcement authorities investigating the illegal presence of an alien, could have (and indeed, should have) discovered his crime at that time. Mr. Gordon argued that the indictment filed against him on May 9, 2006, nearly eleven years later, was therefore barred. (App. 3a-4a.)

The government conceded that the constructive knowledge test was the applicable legal standard and asserted that August 10, 2001, the date Mr. Gordon was admitted to prison in Illinois, was the controlling date for calculating the statute of limitations. According to the government, it *should have* been aware of his illegal presence in the United States when he was admitted to prison, but not when he presented himself to immigration authorities at the San Ysidro border crossing. Consequently, urged the government, the May 9, 2006 indictment was timely.

The district court denied the motion to dismiss without any oral argument and without a hearing. The district court admitted that it had no evidence of "what an ordinary border crossing event at San Ysidro entails," but took judicial notice of Bureau of Transportation statistics regarding the number of people who crossed the border at San Ysidro the year after Mr. Gordon entered, and concluded that the authorities did not "have the ability to check every seemingly legitimate document presented to them."

(App. 30a-31a.)[2] Therefore, the district court concluded, "the government had neither actual nor constructive knowledge of the defendant's illegal reentry into the United States in 1995 when he crossed the border." (App. 31a.)

Gordon then entered into a conditional guilty plea pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, reserving the right to appeal the denial of his motion to dismiss.

C. Court of Appeals

The Court of Appeals for the Seventh Circuit affirmed the decision of the district court but rejected the district court's discussion of the statute of limitations and effectively held that the crime of being found in the United States was not subject to the statute of limitations.

In particular, the court held that "[t]o be 'found in' the United States without permission after deportation means to be 'present in' the United States," and the immigration authority's "discovery" of an alien, "whether actual or constructive," is not an element of the offense. (App. 12a.) (*citing United States v. Are*, 498 F.3d 460, 466 (7th Cir. 2007)).[3] A deportee who has "reentered surreptitiously prolongs his illegal presence in the United States each day he goes undetected" and the "limitations clock does not run

---

[2] The district court found that immigration authorities had access to a computer database that identified previously deported aliens at the border but did not discuss this fact when reaching its conclusion. (App. 29a.)

[3] While Mr. Gordon's case was on appeal, the Seventh Circuit addressed a similar challenge to an illegal reentry prosecution in *United States v. Are*, 498 F.3d 460 (7th Cir. 2007). The statement of law set forth in this case was originally established in *Are*.

during this period because the deportee's crime continues; he remains illegally 'present in' the United States." (App. 12a.)

Despite reaching this conclusion, the court refused to abandon the idea that the statute of limitations could never apply to the "found in" offense, and added that the statute of limitations might possibly begin to run when immigration authorities "actually discover the illegal alien's presence" or when an alien turns himself in or is arrested. (App. 13a.) Either way, however, "constructive knowledge is irrelevant." (App. 14a.)

On the facts of this case, the court then concluded that the statute of limitations could not possibly have begun to run until April 21, 2006, when INS agents interviewed Mr. Gordon in state custody. (*Id.*) The court explained that the government did not have actual knowledge of Mr. Gordon's entry in November 1995 because his entry was "surreptitious." (App. 13a.)[4] Similarly, the court concluded that the statute of limitations did not begin on August 10, 2001, the date the government conceded it should have learned of Mr. Gordon's presence, because the government did not gain actual knowledge of Mr. Gordon's illegal presence that day either. It was irrelevant that the government would have gained knowledge of Mr. Gordon's presence "had standard procedures been followed." (App. 13a.)

In reaching these conclusions, the court openly

---

[4] The Court of Appeals concluded that Gordon's entry was surreptitious because he knew his green card was invalid when he presented it at San Ysidro and because he did not disclose his prior deportation—not because he provided any false information about his identity. (App. 10a.)

rejected the unanimous holdings of five other courts of appeals and placed the law of the Seventh Circuit directly in conflict with those circuits. (App. 10a-11a.) The Courts of Appeals for the Second, Third, Fifth, Eighth, and Eleventh Circuits all agree that the "found in" offense is complete the moment an alien is discovered, and that the statute of limitations begins to run when immigration authorities have either discovered, or should have discovered, his illegal presence in the United States. *See United States v. Rivera-Ventura*, 72 F.3d 277, 281 (2d Cir. 1995); *United States v. Lennon*, 372 F.3d 535, 541 (3d Cir. 2004) (*relying on United States v. DiSantillo*, 615 F.2d 128 (3d Cir. 1980); *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); *United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994); *United States v. Clarke*, 312 F.3d 1343, 1347-48 (11th Cir. 2002). Without reference to the language of either the generic five-year limitations statute or the "found in" clause of Section 1326, the Court of Appeals for the Seventh Circuit concluded that the law in these other circuits provides an improper incentive to illegal aliens to subtly fly under the government's radar and therefore should be rejected. (App. 11a-12a.)

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A STATUTE OF LIMITATIONS FOR THE CRIME OF BEING "FOUND IN" THE UNITED STATES BEGINS TO RUN WHEN THE GOVERNMENT HAS CONSTRUCTIVE KNOWLEDGE OF AN ALIEN'S ILLEGAL PRESENCE IN THE COUNTRY.

The circuit courts are divided over the question of whether the government's constructive discovery of a previously deported alien completes the crime of being "found in" the United States for statute of limitations purposes. (App. 10a-12a.) The circuit conflict over the "found in" provision of 8 U.S.C. § 1326 presents a fundamental disagreement over the plain language of the illegal reentry statute and the language and purpose of the statute of limitations, and the volume of prosecutions brought under the statute throughout the United States necessitates clear direction from this Court.

The Courts of Appeals for the Second, Third, Fifth, Eighth, and Eleventh Circuits have construed the illegal reentry statute as defining an offense that can, under certain circumstances, last for an extended period of time, but *not* one that lasts forever. These courts hold that the "found in" offense begins when an alien illegally crosses into the United States and is complete the moment an alien is "discovered" by law enforcement authorities. The moment of discovery is an objective determination. Discovery occurs when an alien's "physical presence is discovered and noted by the immigration authorities, and the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can

reasonably be attributed to the immigration authorities." *Santana-Castellano*, 74 F.3d at 598; *see also Rivera-Ventura,* 72 F.3d at 282; *DiSantillo*, 615 F.2d at 132; *Gomez*, 38 F.3d at 1037; *Clarke*, 312 F.3d at 1346-47. The statute of limitations for a "found in" violation begins to run "when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation." *Gomez*, 38 F.3d at 1037.

These circuits, therefore, have found that an alien can be "found in" the United States for statute of limitations purposes even though immigration authorities do not have *actual* knowledge of the alien's presence and illegal status in the United States. That is, *constructive* knowledge of an alien's illegal presence is sufficient to trigger the limitations period. *See, e.g.,Clarke*, 312 F.3d at 1346; *Santana-Castellano*, 74 F.3d at 597; *Rivera-Ventura*, 72 F.3d at 280; *Gomez*, 38 F.3d at 1037; *DiSantillo*, 615 F.2d at 135.

The Court of Appeals for the Seventh Circuit, in contrast, adopted two holdings that directly conflict with the precedent of its sister circuits, explicitly rejecting their reasoning. (App. 12a.)

First, the court held that the "found in" offense is a continuing offense that is not complete as long as an alien remains illegally present in the United States. A deportee who has "reentered surreptitiously prolongs his illegal presence in the United States each day he goes undetected" and the "limitations clock does not run during this period because the deportee's crime continues; he remains illegally 'present in' the United States." (*Id.*)

Second, the court held that to the extent the statute of limitations applies, it could not possibly be triggered until the subjective moment when immigration

authorities actually discover an alien's illegal presence, and may not begin until the point of arrest. (*Id.*) Either way, constructive knowledge of an alien's illegal presence in the United States is irrelevant to any calculation of the statute of limitations. (*Id.*)

The Court's guidance is necessary to ensure the consistent application of these statutes throughout the country. After drug offenses, illegal reentry has become the most frequently prosecuted federal offense in the United States.[5] More than 11,000 people were sentenced under the illegal reentry guideline in 2007, representing more than 15% of all federal cases.[6] Indeed, in some recent months, illegal reentry has been the most common lead charge in the country.[7] The number of illegal reentry prosecutions is increasing dramatically in non-border states as well as border states. In February 2008, Kansas and Iowa

---

[5] U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics, Fiscal Year 2007, Table 17: Offenders Sentenced for Each Chapter Two Guideline, available at http://www.ussc.gov/ANNRPT/2007/Table17.pdf (last visited June 13, 2008). The top five offense guidelines imposed in federal criminal cases last fiscal year were for drug offenses, U.S.S.G. § 2D1.1 (25,858 offenders), illegal reentry, U.S.S.G. § 2L1.2 (11,122 offenders), fraud or theft, U.S.S.G. § 2B1.1 (8,777 offenders), firearm offenses, U.S.S.G. § 2K2.1 (6,814 offenders), and alien smuggling, U.S.S.G. § 2L1.1 (3,464 offenders).

[6] *Id.*

[7] Statistics show that 8 U.S.C. § 1326 was the most frequent lead charge in federal court in February 2008 and June 2006. *See* http://trac.syr.edu/tracreports/bulletins/overall/ monthly feb08/fil/ and http://trac.syr.edu/tracreports/bulletins/ immigration/monthlyjun06 (visited June 3, 2008). These statistics also show that this was true in the year previous as well as five years previous.

were among the top ten jurisdictions for such cases.[8] The vast majority of prosecutions in non-border states are charges brought under the "found in" provision of 8 U.S.C. § 1326.[9]

The sheer volume of illegal reentry prosecutions throughout the United States exacerbates the existing circuit split and heightens the need for clear direction from the Court.

II. THE DECISION BELOW IS INCONSISTENT WITH THE PLAIN LANGUAGE OF 8 U.S.C. § 1326, DEPRIVES DEFENDANTS OF THE PROTECTION OF THE STATUTE OF LIMITATIONS, AND ENCOURAGES NEGLIGENCE BY LAW ENFORCEMENT.

This Court should adopt the correct and reasoned application of 8 U.S.C. § 1326, used by a majority of the circuit courts, that the "found in" illegal reentry offense is complete, and the statute of limitations begins to run, when the government knows or should know of an alien's illegal presence in the country.

The law in the Seventh Circuit effectively eliminates the statute of limitations for "found in" prosecutions because it essentially holds that nothing short of the government's decision to arrest or prosecute the offender will trigger the statute of limitations. Until that point, the government is free to overlook and condone the alien's illegal presence—without limitation—and thereby prolong the offense indefinitely. The crime can continue for as long as the

---

[8] *Id.*

[9] A person also can be prosecuted for entering or attempting to enter the United States under 8 U.S.C. § 1326 in non-border states with international airports.

authorities choose not to enforce the law. This is true even under an actual knowledge standard: the government can prolong the crime by refusing to exercise reasonable diligence. The crime continues, if the authorities so choose, even if an alien presents himself to immigration authorities in the United States and openly identifies himself by name and alien number.

Few crimes have been so construed. In *Toussie v. United States*, 397 U.S. 112, 115 (1970), this Court addressed the "tension" between the continuing offense doctrine and the purpose of a statute of limitations and emphasized the importance of construing statutes, whenever possible, in a way that preserves a statute of limitations. "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." *Id.* at 114. A statute of limitation "is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Id.* at 114-15. It also has the "salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Id.* at 115. For these reasons and others, "criminal limitations statutes are 'to be . . . liberally interpreted in favor of repose.'" *Id.* (internal citations omitted).

While *Toussie* left room for the possibility that certain crimes could be construed as continuing offenses that effectively eliminate the statute of limitations, those situations are permitted only when explicitly compelled by the language of the substantive

criminal statute or the nature of the crime "is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115. Neither situation applies here.

First, the language of 8 U.S.C. § 1326 does not compel the conclusion that illegal reentry is a continuing offense that lasts beyond the point of discovery. Congress knows how to define an offense as continuing when it wants to and, unlike some other statutes, Congress did not expressly define illegal reentry as a continuing offense. *See, e.g.*, 18 U.S.C. § 3284 (the crime of concealing a bankrupt's assets "shall be deemed to be a continuing offense . . . and the period of limitations shall not begin to run until such final discharge or denial of discharge.").

Moreover, there is nothing implicit in the words that Congress used when drafting the illegal reentry statute compelling the conclusion that the "found in" offense is a continuing offense. Courts give full effect to the plain meaning of statutory language whenever possible. *See Cent. Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354, 360-61 (1982). The common understanding of the phrase "found in" is "discovered"—an event that can be pinpointed to a particular moment in time—not "present" or some other word that implies an ongoing circumstance. *See, e.g.*, Merriam Webster's College Dictionary, Tenth Edition (1997) (definitions for the verb "find" include "encounter," "to come upon by searching or effort," and "to discover," but not "being in" or "present in" or any synonyms of those phrases); *see also United States v. Lennon*, 372 F.3d 535, 541 (3d Cir. 2004) (holding that plain meaning of "found in" is "discovered" in the context of guideline culpability); *United States v. Hernandez,* 189 F.3d 785, 789 (9th

Cir. 1999) (same in context of venue); *United States v. Bencomo-Castillo*, 176 F.3d 1300, 1303 (10th Cir. 1999) (same in context of guideline culpability); *United States v. Meraz-Valeta*, 26 F.3d 992, 997 (10th Cir. 1994) (same in context of unconstitutional vagueness challenge); *United States v. Whittaker*, 99 F.2d 38, 42 (2d Cir. 1993) (same in context of guideline culpability).[10]

Thus, by the plain terms of the statute, the "found in" offense is a finite crime. It is complete at the moment the government discovers an alien's illegal presence, because an alien who is discovered in the United States is "found in" the United States. Discovery thereby triggers the statute of limitations and obligates the government to act within the limitations period. *See Toussie*, 397 U.S. at 115 (statutes of limitations begin to run when a crime is complete).

Second, the nature of the illegal reentry offense is not such that Congress must assuredly have intended to make Section 1326 a continuing offense. The crime is illegal "reentry" of removed aliens, not illegal "presence" of removed aliens. *See* 8 U.S.C. § 1326 (titled "Reentry of removed aliens"). The "at any time found in" provision was added solely to permit the prosecution of those who could not be captured at the border and prosecuted for entering or attempting to

---

[10] The Seventh Circuit also reached the conclusion that "found in" means "discovered" in *United States v. Herrera-Ordones*, 190 F.3d 504, 510 (7th Cir. 1999). Seven years later, however, in *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 461 (7th Cir. 2006), the Seventh Circuit changed course, concluding that the "found in" discussion in *Herrera-Ordones* was dicta and was wrong.

enter the United States. *See United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991) (noting that Congress added the phrase "found in" to alleviate the problem of prosecuting aliens who enter in some surreptitious manner). That purpose is plainly served by delaying the limitations period for as long as the government does not know (or should not by reasonable diligence know) of an alien's illegal presence in the United States, but also by imposing the limitations period once the government actually or constructively obtains that knowledge.

Under a constructive knowledge standard, the government's interest in prosecuting immigration crimes is protected as long as it is diligently pursuing lawbreakers. Nothing in the statute requires the government to "exercise more than reasonable diligence in screening for previously deported aliens." *See, e.g., Bencomo-Castillo*, 176 F.3d at 1303-04 (the limitations period is not triggered for an alien who continues to successfully conceal his identity or presence within the United States by using an alias). Indeed, such a construction imposes no greater burden upon law enforcement than the burden that exists in nearly every other crime for which a statute of limitations applies.

At the same time, consistent with *Toussie*, the use of a constructive knowledge standard protects a defendant's ability to defend him or herself against charges when facts and witnesses necessary to a defense remain available. It is a defense to illegal reentry to show that an alien's prior deportation was fundamentally unfair, *see United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) and 8 U.S.C. § 1326(d), and evidence of a previous deportation proceeding or the unfairness of any underlying allegation can disappear

with time. It may also be a defense—requiring evidence that can disappear with time—to show that an alien obtained proper permission to return to the United States, that a person is, in fact, a citizen of the United States (e.g., by virtue of derivative citizenship because of a grandparent's grant of amnesty or service in the military), or that an alien left the United States voluntarily (as opposed to being deported or removed). The objective, constructive knowledge standard of the Second, Third, Fifth, Eighth, and Eleventh Circuits means that an alien can conclude his offense, on his own, by revealing his presence and identity to law enforcement authorities, and preserve his basic interest in repose.

In this case, immigration officials had constructive knowledge that Mr. Gordon was present in the United States when he provided accurate identifying information at the San Ysidro border, including his name, date of birth, alien registration number, photograph, and fingerprint. Indeed, it is hard to imagine what additional information Mr. Gordon could have presented to immigration authorities that would have better notified the government of his illegal presence, particularly when those immigration authorities had access to a computer database specifically designed to verify the status of aliens entering the United States. For these reasons, he was "found in" the United States, his crime was complete, and the limitations period triggered in November 1995. While the government can still deport Mr. Gordon from the United States, its May 9, 2006 prosecution is barred by the statute of limitations.

CONCLUSION

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

Respectfully submitted,

MATTHEW M. SHORS
DAVID J.L. MORTLOCK
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

GABRIEL BANKIER PLOTKIN
Counsel of Record
DANIEL M. FEENEY
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street, Suite 3600
Chicago, IL 60601
(312) 263-3700

June 23, 2008