No. 18-6187

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO MARTINEZ-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's jury instructions concerning unlawful procurement of naturalization under 18 U.S.C. 1425(a) were plainly erroneous in light of Maslenjak v. United States, 137 S. Ct. 1918 (2017).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is not published in the Federal Reporter but is available at 2018 WL 4037286.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2018. The petition for a writ of certiorari was filed on September 17, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted on one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 1341 and 1349; nine counts of health care fraud, in violation of 18 U.S.C. 1347; seven counts of mail fraud, in violation of 18 U.S.C. 1341; and one count of unlawful procurement of naturalization, in violation of 18 U.S.C. 1425(a). The district court sentenced petitioner to 87 months of imprisonment, to be followed by two years of supervised release. Judgment 1-3. The court also revoked petitioner's United States citizenship under 8 U.S.C. 1451(e). D. Ct. Doc. 331 (July 24, 2017). The court of appeals affirmed. Pet. App. 1-14.

1. In April 2012, petitioner and several associates joined in a conspiracy to commit health care fraud. Pet. App. 1-2. The scheme consisted of opening and operating physical therapy clinics that would bill health insurers for treatments that were never provided. Ibid. To effectuate the scheme, petitioner and others recruited individuals to stage car accidents, coached them to feign compensable injuries, and then escorted them to a local doctor's office, where the individuals would receive prescriptions for physical therapy. Id. at 1-3. The individuals would then sign either blank therapy forms or forms overstating the treatment they received, and the clinics would submit those forms to insurers.

Id. at 2. In exchange for their participation, the individuals would receive between one and two thousand dollars. Ibid.

By August 2013, the conspiracy had grown to three clinics in western Michigan, each of which petitioner helped operate. Pet. App. 1-3, 13-14. By the time petitioner was arrested in 2016, he and his co-conspirators had defrauded insurance providers of nearly $900,000, with an intended loss of more than $1.6 million. Amended Presentence Investigation Report (PSR) ¶ 110.

While this conspiracy was ongoing, petitioner also sought to become a United States citizen. In February 2013, petitioner -- a native of Cuba -- completed a Form N-400 Application for Naturalization. Pet. App. 9; PSR ¶ 8. On that form, he responded "No" to a question asking whether he had "previously committed a crime or offense for which he had not been arrested." Ibid. On June 11, 2013, petitioner reaffirmed that negative answer in a naturalization interview with an immigration official. 3/13/17 Tr. 1073-1075. And on August 21, 2013, just before taking the oath of citizenship, petitioner attested that, since his naturalization interview, he had not committed any crimes for which he had not been arrested. Id. at 1075, 1077-1078. Petitioner was thereafter naturalized as a United States citizen. Id. at 1075.

2. On February 22, 2017, a federal grand jury returned an indictment charging petitioner with one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 1341 and 1349; nine counts of health care fraud, in violation of 18 U.S.C. 1347; seven

counts of mail fraud, in violation of 18 U.S.C. 1341; and one count of procuring naturalization contrary to law, in violation of 18 U.S.C. 1425(a). Fourth Superseding Indictment 1-20. As to the Section 1425(a) count, the operative indictment alleged that petitioner illegally procured his citizenship by denying in his naturalization application, under penalty of perjury, that he had previously committed a crime for which he was not arrested (namely, the health care fraud scheme). Id. at 15; see 18 U.S.C. 1015(a) (prohibiting knowingly making a false statement under oath in a matter relating to naturalization).

Petitioner proceeded to trial with two co-defendants. Pet. App. 4. At the close of evidence, petitioner declined to move for judgment of acquittal under Federal Rule of Criminal Procedure 29. Pet. App. 7. In the parties' joint proposed jury instructions, the government noted that this Court had recently granted a petition for a writ of certiorari in Maslenjak v. United States, No. 16-309, to consider whether a conviction under Section 1425(a) predicated on a false statement in naturalization proceedings requires that the false statement be material. D. Ct. Doc. 237, at 60 (Feb. 24, 2017). "[T]o prevent any possible appeal," the government requested that "the element of materiality be included in the jury instruction." Ibid.

The district court agreed to give such an instruction, and petitioner's counsel did not object. 3/15/17 Tr. 1325. Accordingly, the court instructed the jury that "[o]ne of the laws

governing naturalization prohibits an applicant from knowingly making any materially false statement under oath relating to naturalization." Id. at 1460 (emphasis added). The court continued: "A materially false statement is a statement that had a natural tendency to influence or is capable of influencing the decision of immigration officials." Ibid. After the court instructed the jury, petitioner's counsel confirmed that he had no objections to the instructions. Id. at 1470. The jury found petitioner guilty on all counts. Id. at 1472-1479.

The district court sentenced petitioner to 87 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. The court also revoked petitioner's United States citizenship as a result of his Section 1425(a) conviction. D. Ct. Doc. 331; see 8 U.S.C. 1451(e) ("When a person shall be convicted under section 1425," the district court "shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled.").

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-14.

Petitioner's brief raised only one argument on his Section 1425(a) conviction: that insufficient evidence existed to support a finding of guilt. Pet. C.A. Br. 22-27. Petitioner did not challenge the jury instructions on the Section 1425(a) count, and neither of the parties' briefs cited or addressed any matter

related to Maslenjak v. United States, 137 S. Ct. 1918 (2017), which this Court had decided more than six months before petitioner filed his brief on appeal.

At oral argument before the court of appeals, for the first time, petitioner suggested that the district court's Section 1425(a) instructions were erroneous in light of Maslenjak. C.A. Oral Arg. at 3:11-8:01.* According to petitioner, "the jury instructions that we crafted in th[is] case only had the jury rely on whether or not the agent felt that the lie was material. * * * But [this Court's decision in Maslenjak] says that that's not enough. It says that it has to be material and * * * that that material decision would have led to a disqualification." Id. at 7:25-8:01.

Although it viewed petitioner's decision not to raise his sufficiency challenge in a post-trial Rule 29 motion as potentially foreclosing appellate review on waiver grounds, the court of appeals nevertheless reviewed the sufficiency claim under a "manifest miscarriage of justice" standard and rejected it on the merits. Pet. App. 7-11. The court did not address petitioner's suggestion at oral argument that the jury instructions were erroneous under Maslenjak.

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* An audio recording of oral argument in the court of appeals is available at www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/08-02-2018 - Thursday/17-1860 USA v Antonio Martinez-Lopez.mp3.

ARGUMENT

Petitioner contends (Pet. 3-5) that the district court's jury instructions regarding the elements of 18 U.S.C. 1425(a) were erroneous in light of Maslenjak v. United States, 137 S. Ct. 1918 (2017), because they failed to require proof that his false statement was "causally connected" to his acquisition of citizenship. Petitioner failed to preserve this challenge in the district court or on appeal, and neither court below addressed it. In any event, the district court's instructions were not plainly erroneous. The petition for a writ of certiorari should be denied.

1. This Court is "a court of review, not of first view." Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005). Accordingly, this Court's "traditional rule * * * precludes a grant of certiorari" to decide a question that "'was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (declining to review claim "without the benefit of thorough lower court opinions to guide our analysis of the merits").

The question presented here was never briefed in, let alone decided by, either the district court or the court of appeals. Petitioner first raised his claim at oral argument before the court of appeals, which was too late to preserve it. See Kuhn v. Washtenaw Cnty., 709 F.3d 612, 624 (6th Cir. 2013) ("This court has consistently held that arguments not raised in a party's

opening brief * * * are waived."). The court of appeals accordingly did not mention the issue in its opinion discussing the Section 1425(a) conviction. Pet. App. 6-11. Petitioner identifies no reason for this Court to depart from its usual practice of declining to review claims in the first instance.

2. In any event, petitioner's factbound challenge lacks merit. Because petitioner did not object to the district court's jury instructions, his challenge to them is reviewable only for plain error. To show plain error, petitioner must demonstrate that (1) the district court committed an "error"; (2) the error was "clear" or "obvious"; (3) the error affected his "substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted). Petitioner cannot meet that standard.

a. The district court's jury instructions were not clearly or obviously erroneous. When, as here, a defendant is charged with making a false statement in connection with an application for naturalization, the government must prove "that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to other facts warranting that result." Maslenjak, 137 S. Ct. at 1923. This "causal inquiry * * * is framed in objective terms: To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how

knowledge of the real facts would have affected a reasonable government official properly applying naturalization law." Id. at 1928.

The district court instructed the jury that it could find petitioner guilty of violating Section 1425(a) only if it found beyond a reasonable doubt that petitioner made a "materially false statement" -- i.e., one that "had a natural tendency to influence or [wa]s capable of influencing the decision of immigration officials" to grant petitioner's application for naturalization. 3/15/17 Tr. 1460. That instruction substantially corresponds to the objective inquiry required by Maslenjak: whether petitioner's false statement "would have affected a reasonable government official properly applying naturalization law." 137 S. Ct. at 1928. The district court steered well clear of the erroneous instructions in Maslenjak, which allowed for conviction on the basis of any false statement, "no matter how inconsequential to the ultimate decision." Id. at 1930.

Accordingly, the district court's instructions were not erroneous, much less "'clear[ly]'" or "'obvious[ly]'" so. Olano, 507 U.S. at 734. Indeed, the court adopted those instructions precisely to forestall any potential objection based on Maslenjak, which was pending before this Court at the time of the trial in this case. See D. Ct. Doc. 237, at 60.

b. Even if the instructions were clearly and obviously erroneous, however, petitioner cannot satisfy either the third or

fourth prong of plain-error review. To establish an effect on "'substantial rights,'" a defendant ordinarily "must make a specific showing of prejudice." Olano, 507 U.S. at 735 (citation omitted). And to establish a serious effect on the fairness, integrity, or public reputation of judicial proceedings, a defendant convicted at trial ordinarily must make a showing that the error "affect[ed] the jury's verdict." United States v. Marcus, 560 U.S. 258, 265-266 (2010). Because the evidence at trial conclusively demonstrated that petitioner's false statements "contributed to [his] obtaining of citizenship," Maslenjak, 137 S. Ct. at 1925, petitioner cannot establish that the district court's instructions affected the outcome of his trial.

First, the immigration official who conducted petitioner's naturalization interview testified that it would have "affected [his] decision about whether to go forward on [petitioner's] naturalization process" if he had known that petitioner was committing insurance fraud or that petitioner had failed to disclose that information in his naturalization application. 3/13/17 Tr. 1074. Petitioner did not attempt to rebut that testimony at trial, and does not challenge it now.

Second, the facts that petitioner concealed were "themselves disqualifying," such that his false statements necessarily contributed to his acquisition of citizenship. Maslenjak, 137 S. Ct. at 1928. An applicant for naturalization must establish that he "has been and still is a person of good moral character"

during the five years preceding the filing of his application and during the period between the filing and adjudication of his application. 8 U.S.C. 1427(a). A person is not of "good moral character" if he is "a member of one or more of the classes of persons * * * described in * * * subparagraphs (A) and (B) of section 1182(a)(2)." 8 U.S.C. 1101(f)(3). Subparagraph (A) of section 1182(a)(2) describes someone "who admits committing acts which constitute the essential elements of * * * a crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I). Fraud, such as the healthcare fraud perpetrated by petitioner, is a crime of moral turpitude. See Jordan v. De George, 341 U.S. 223, 228-229 (1951) ("[F]raud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude."); see also Bullock v. BankChampaign, N.A., 569 U.S. 267, 274-275 (2013). Therefore, by concealing his participation in acts that constitute the essential elements of fraud, petitioner lied about facts that vitiated his good moral character and thus "misrepresent[ed] facts that the law deems incompatible with citizenship," Maslenjak, 137 S. Ct. at 1928. Accordingly, "h[is] lie * * * played a role in h[is] naturalization," id. at 1929.

Independently, a person is not of "good moral character" if he "has given false testimony for the purpose of obtaining any benefits" under the immigration laws. 8 U.S.C. 1101(f)(6); Kungys v. United States, 485 U.S. 759, 779-780 (1988). Petitioner has

never disputed that he gave false statements during his naturalization interview for the subjective purpose of obtaining immigration benefits. And Department of Homeland Security regulations require that a naturalization interview be conducted under oath, 8 C.F.R. 335.2(c), which means the statements qualify as "testimony." See Kungys, 485 U.S. at 780 (defining "testimony" as "oral statements made under oath"). It follows that petitioner cannot show that he is a "person of good moral character" for that reason as well. See Maslenjak, 137 S. Ct. at 1927, 1930-1931.

In view of the foregoing, petitioner cannot demonstrate that any instructional error "affected the outcome of the district court proceedings." Puckett v. United States, 556 U.S. 129, 135 (2009) (citation omitted). Likewise, because the evidence that his false statements would have been disqualifying to his citizenship bid was "essentially uncontroverted at trial" and petitioner "has presented no plausible argument" to the contrary, petitioner cannot satisfy the fourth prong of plain-error review. Johnson v. United States, 520 U.S. 461, 470 (1997). Petitioner therefore is not entitled to relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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