No. 18-9699

IN THE SUPREME COURT OF THE UNITED STATES

JOSE GARCIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

PAUL T. CRANE
Attorney

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

QUESTION PRESENTED

Whether petitioners are entitled to plain error relief on their claim that conviction under 21 U.S.C. 841 and 21 U.S.C. 960 requires proof of knowledge of drug type and quantity.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Garcia, No. 18-cr-143 (Aug. 20, 2018)

United States v. Olivera-Sanchez, No. 17-cr-538 (Oct. 30, 2018)

United States v. Ramos, No. 18-cr-69 (Oct. 1, 2018)

United States v. Torres-Gomez, No. 18-cr-145 (Sept. 21, 2018)

United States Court of Appeals (5th Cir.):

United States v. Garcia, No. 18-40752 (Mar. 8, 2019)

United States v. Olivera-Sanchez, No. 18-40993 (May 14, 2019)

United States v. Ramos, No. 18-40957 (May 22, 2019)

United States v. Torres-Gomez, No. 18-40918 (April 4, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-9699

JOSE GARCIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A2, B1-B2, C1-C2, D1-D2) are not published in the Federal Reporter but are reprinted at 756 Fed. Appx. 474 (Garcia), 770 Fed. Appx. 207 (Olivera-Sanchez), 770 Fed. Appx. 674 (Ramos), and 764 Fed. Appx. 414 (Torres-Gomez).[1]

---

[1] Pursuant to this Court's Rule 12.4, petitioners are Jose Garcia, Miguel Olivera-Sanchez, Roel Ruben Ramos, and Jorge Alberto Torres-Gomez, who received separate judgments from the same court of appeals presenting closely related questions. See Pet. ii.

JURISDICTION

The judgment of the court of appeals with respect to petitioner Garcia was entered on March 8, 2019. The judgment of the court of appeals with respect to petitioner Olivera-Sanchez was entered on May 14, 2019. The judgment of the court of appeals with respect to petitioner Ramos was entered on May 22, 2019. The judgment of the court of appeals with respect to petitioner Alberto Torres-Gomez was entered on April 4, 2019. The petition for a writ of certiorari was filed on June 5, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the Southern District of Texas, petitioners Garcia, Ramos, and Torres-Gomez were convicted of violations of either 21 U.S.C. 841 or 21 U.S.C. 960 (2012 Supp. V 2017). Pet. App. A1-A2, C1-C2, D1-D2. Following a jury trial in the United States District Court for the Southern District of Texas, petitioner Olivera-Sanchez was convicted on one count of possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841. Pet. App. B1-B2. Garcia was sentenced to 84 months of imprisonment, to be followed by four years of supervised release. Garcia Judgment 2-3. Ramos was sentenced to 87 months of imprisonment, to be followed by four years of supervised release. Ramos Judgment 1-3. Torres-Gomez was sentenced to 87 months of imprisonment, with no supervised release. Torres-Gomez

Judgment 2. Olivera-Sanchez was sentenced to 97 months of imprisonment, to be followed by four years of supervised release. Olivera-Sanchez Judgment 2-3. The court of appeals affirmed all four convictions. Pet. App. A1-A2, B1-B2, C1-C2, D1-D2.

1. a. Petitioner Garcia was the driver and sole occupant of a vehicle that approached a Border Patrol checkpoint in Sarita, Texas with 4.4 kilograms of cocaine hidden inside. Garcia 5/9/18 Re-arraignment Hear'g Tr. 59 (Garcia Tr.). A grand jury in the Southern District of Texas returned an indictment charging Garcia with conspiracy to possess more than 500 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and 846; and possession of more than 500 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). Garcia Indictment 1-2.

Garcia pleaded guilty to the second count, and the government dismissed the first. Garcia Judgment 1. During Garcia's re-arraignment hearing, the district court informed Garcia that, pursuant to 21 U.S.C. 841(b)(1)(B), he was subject to a mandatory minimum term of imprisonment of five years and a statutory maximum of 40 years. Garcia Tr. 26-27. Garcia did not object to the factual basis of his guilty plea or to the application of the mandatory minimum. See Garcia C.A. Letter Br. 3. The district court later sentenced him to 84 months of imprisonment. Garcia Judgment 2-3.

b. Petitioner Torres-Gomez drove a vehicle from Mexico to the Hidalgo, Texas port-of-entry with approximately 20 kilograms of cocaine hidden inside. Torres-Gomez 4/2/18 Re-arraignment Hear'g Tr. 19 (Torres-Gomez Tr.). A grand jury in the Southern District of Texas returned an indictment charging Torres-Gomez with four counts, including (as relevant here) importing five kilograms or more of cocaine into the United States from Mexico, in violation of 21 U.S.C. 952(a), 960(a)(1) and (b)(1). Torres-Gomez Indictment 1-3. Pursuant to a plea agreement, Torres-Gomez pleaded guilty to that count, and the government dismissed the remaining counts. Torres-Gomez Judgment 1; Torres-Gomez Plea Agreement 1.

Torres-Gomez did not object in the district court to the factual basis of his guilty plea. Torres-Gomez C.A. Letter Br. 2. During his re-arraignment hearing, the district court informed Torres-Gomez that, pursuant to 21 U.S.C. 960(b)(1), he was subject to a mandatory minimum term of imprisonment of ten years and a statutory maximum of life imprisonment. Torres-Gomez Tr. 10. Torres-Gomez did not object to the applicability of that mandatory minimum sentence. The district court later sentenced him to 87 months of imprisonment. Torres-Gomez Judgment 2.

c. Petitioner Ramos was the driver of a vehicle containing 102 kilograms of marijuana that was stopped by Border Patrol Agents near the Rio Grande River. Ramos 5/30/18 Re-arraignment Hear'g Tr. 27-28 (Ramos Tr.). A grand jury in the Southern District of

Texas returned an indictment charging Ramos with conspiracy to possess more than 100 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1)and (b)(1)(B), and 846; and possession of more than 100 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B). Ramos Indictment 1-2. Pursuant to a plea agreement, Ramos pleaded guilty to the possession count, and the government dismissed the conspiracy count. Ramos Judgment 1; Ramos Plea Agreement 1-2.

Ramos did not object in the district court to the factual basis of his guilty plea. Ramos C.A. Letter Br. 3. During Ramos's re-arraignment hearing, Ramos stated that he knew the vehicle contained bundles of marijuana. Ramos Tr. 29. The district court informed Ramos during the hearing that, pursuant to 21 U.S.C. 841(b)(1)(B), he was subject to a mandatory minimum term of imprisonment of five years and a statutory maximum of 40 years. Ramos Tr. 16. Ramos did not object to the applicability of that mandatory minimum sentence. The district court later sentenced him to 87 months of imprisonment. Ramos Judgment 1-3.

d. Petitioner Olivera-Sanchez approached the Sarita Border Patrol checkpoint with 5.5 kilograms of cocaine hidden in his vehicle. Olivera-Sanchez Presentence Investigation Report ¶ 5. A grand jury in the Southern District of Texas returned an indictment charging Olivera-Sanchez with possession of more than 500 grams of cocaine with intent to distribute it, in violation of 21 U.S.C.

841(a)(1) and (b)(1)(B). Olivera-Sanchez Indictment 1. The case proceeded to trial, and the jury found Olivera-Sanchez guilty. Olivera-Sanchez Judgment 1.

During the trial, Olivera-Sanchez did not move for a judgment of acquittal at the close of the government's case-in-chief. Olivera-Sanchez C.A. Letter Br. 3. Olivera-Sanchez also did not object to the jury instructions, which informed the jury that the government had to prove beyond a reasonable doubt "that the defendant knowingly possessed a controlled substance"; "that the substance was in fact cocaine as alleged"; "that the defendant possessed the substance with intent to distribute it"; and "that the quantity of the substance was at least 500 grams." Olivera-Sanchez 7/31/18 Trial Tr. 323 (July 31, 2018). The district court sentenced him to 97 months of imprisonment. Olivera-Sanchez Judgment 2-3.

2. In the court of appeals, each petitioner filed an unopposed motion for summary disposition, in which they advanced appellate arguments that they acknowledged to be foreclosed by circuit precedent. Garcia C.A. Unopposed Mot. for Summ. Disposition 2-3; Torres-Gomez C.A. Unopposed Mot. for Summ. Disposition 2-3; Ramos C.A. Unopposed Mot. for Summ. Disposition 2-3; Olivera-Sanchez C.A. Unopposed Mot. for Summ. Disposition 4-5.

Garcia and Torres-Gomez each filed letter briefs arguing that, under Flores-Figueroa v. United States, 556 U.S. 646 (2009)

-- which had addressed the mens rea required for aggravated identity theft under 18 U.S.C. 1028A(a)(1), see 556 U.S. at 647 -- the factual basis of their respective guilty pleas was insufficient because they did not establish that they had knowledge of the drug type and quantity involved in their offenses. See Garcia C.A. Letter Br. 2-9; Torres-Gomez C.A. Letter Br. 2-10. Ramos filed a letter brief arguing that, under Flores-Figueroa, the factual basis of his guilty plea was insufficient because the government failed to establish that he knew the quantity of the controlled substance involved in his offense, though he did not contest that the factual basis was sufficient to establish his knowledge of drug type. See Ramos C.A. Letter Br. 3-9. All three petitioners acknowledged that, because they had not raised their objections in the district court, the claims were reviewable only for plain error. See Garcia C.A. Letter Br. 3; Ramos C.A. Letter Br. 3; Torres-Gomez C.A. Letter Br. 2.

Olivera-Sanchez filed a letter brief arguing that, under Flores-Figueroa, the evidence presented at trial was insufficient to support his conviction because the government failed to prove that he knew the drug type and quantity involved in his offense. Olivera-Sanchez C.A. Letter Br. 2-10. Olivera-Sanchez also argued that the jury instructions were erroneous because they did not require the jury to find that he had knowledge of drug type and quantity. Id. at 4-10. He acknowledged that his sufficiency of the evidence claim was reviewable only for plain error. Id. at 4.

He also acknowledged that he "did not object to the jury instructions," but he argued that plain error review did not apply because the district court "explicitly recognized that the defendant's knowledge of the type of drugs could be an issue in the case, although [the Fifth Circuit] had ruled otherwise." Ibid.

All of the petitioners recognized that their arguments were foreclosed by the court of appeals' prior decision in United States v. Betancourt, 586 F.3d 303, 308-309 (5th Cir. 2009), cert. denied, 559 U.S. 1021 (2010), which had reaffirmed, after the identity-theft decision in Flores-Figueroa, that knowledge of drug type and quantity is not an element of the offense under 21 U.S.C. 841. See Pet. App. A1-A2, B1-B2, C1-C2, D1-D2. Relying on Betancourt, the court of appeals summarily affirmed all four judgments of conviction. Ibid.

ARGUMENT

Petitioners contend (Pet. 6-15) that, under the reasoning of Flores-Figueroa v. United States, 556 U.S. 646 (2009), a drug conviction under 21 U.S.C. 841 or 960 requires proof that the defendant knew the specific drug type and quantity involved in the offense. That contention is foreclosed by McFadden v. United States, 135 S. Ct. 2298 (2015), in which this Court held that 21 U.S.C. 841(a)(1) "requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules." 135 S. Ct. at 2304. Petitioners also contend (Pet. 15-16) that, if proof of the knowledge of drug

type and quantity is not required, convictions under Section 841 and Section 960 violate the Due Process Clause. That argument was not pressed or passed on below and, in any event, lacks merit. The court of appeals' decisions are correct and do not conflict with any decision of another court of appeals. This Court has recently and repeatedly denied review in cases raising similar issues,[2] and should follow the same course here.

1. Petitioners assert (Pet. 6-15) that 21 U.S.C. 841 and 960 require proof beyond a reasonable doubt that they knew the specific drug type and quantity involved in their offenses. That contention, which may be reviewed only for plain error,[3] is foreclosed by McFadden, supra.

a. In McFadden, the Court considered the scope of the knowledge requirement in Section 841(a), which establishes the mens rea requirement for both the Controlled Substances Act, 21 U.S.C. 841, and the Controlled Substance Analogue Enforcement Act

---

[2] See, e.g., Proa-Dominguez v. United States, 139 S. Ct. 837 (2019) (No. 18-6707); Dado v. United States, 574 U.S. 992 (2014) (No. 14-383); Dolison v. United States, 540 U.S. 946 (2003) (No. 02-10689); Rodgers v. United States, 536 U.S. 961 (2002) (No. 01-5169); Wood v. United States, 532 U.S. 924 (2001) (No. 00-7040).

[3] Garcia, Ramos, and Torres-Gomez acknowledged below that plain error review applies. See p. 7, supra. Olivera-Sanchez acknowledged that plain error applies to his sufficiency of the evidence challenge, and acknowledged that he failed to object to the jury instructions in his case, but asserted that the jury instruction claim should not be reviewed under plain error because the judge remarked on a potential issue. Olivera-Sanchez C.A. Letter Br. 4. Under Federal Rule of Criminal Procedure 30(d), however, "[f]ailure to object" to an instruction triggers plain-error review.

of 1986, 21 U.S.C. 813, under which the defendant in McFadden was convicted. 135 S. Ct. at 2303. Section 841(a) makes it "unlawful for any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Ibid. (citation omitted). McFadden explained that "[t]he ordinary meaning" of that provision "requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules." Id. at 2304.

The Court reasoned that, "[u]nder the most natural reading," the term "'knowingly' applies not just to the statute's verbs but also to the object of those verbs -- 'a controlled substance.'" McFadden, 135 S. Ct. 2304 (citation omitted). And the Court determined that the use of the "indefinite article 'a'" and the statutory definition of a 'controlled substance' as 'a drug or other substance, or immediate precursor' listed on a federal schedule, establish that a defendant need "not know which substance" he is dealing with so long as he "kn[ows] he possessed a substance listed on the schedules." Ibid. (citations omitted). The Court thus approvingly cited court of appeals cases recognizing the limited nature of Section 841(a)'s knowledge requirement. Ibid. (citing United States v. Andino, 627 F.3d 41, 45-46 (2d Cir. 2010); United States v. Gamez-Gonzalez, 319 F.3d 695, 699 (5th Cir.), cert. denied, 538 U.S. 1068 (2003); United States v.

Martinez, 301 F.3d 860, 865 (7th Cir. 2002), cert. denied, 537 U.S. 1136 (2003)).

McFadden, which petitioners do not mention or cite, accordingly forecloses petitioners' claim (Pet. 6) that the "knowingly" requirement in Section 841(a) applies to "drug type and drug quantity." The Court in McFadden made clear that Section 841(a) "requires a defendant to know only" that he is dealing with a controlled substance. 135 S. Ct. at 2304 (emphasis added). That would not be true if it also required a defendant to know the type and quantity of the drug in question. McFadden expressly stated that a defendant "would be guilty of knowingly distributing 'a controlled substance'" "even if he does not know precisely what substance it is." Ibid. And while McFadden determined that the word "'knowingly'" was "natural[ly] read[]" to apply to the "verbs" and "object of the verb" in Subsection 841(a), ibid., the drug type and quantity requirements are found in Section 841(b), which describes (with certain exceptions) how a person who violates Section 841(a) "shall be sentenced" by specifying different maximum and minimum sentences for particular types and quantities of drugs. The court of appeals decisions cited approvingly in McFadden accordingly specifically rejected importing Section 841(a)'s language into Section 841(b). Ibid. (citing Andino, 627 F.3d at 45-46; Gamez-Gonzalez, 379 F.3d at 699; Martinez, 301 F.3d at 865).

For similar reasons, McFadden forecloses petitioners' assertions with respect to Section 960 (Pet. 6). Petitioners do not distinguish their arguments with respect to Section 960 (which are relevant only to Torres-Gomez) from their arguments regarding Section 841, and the two statutes are structured very similarly. Section 960(a), entitled "Unlawful acts," provides that any person who violates certain statutes by "knowingly or intentionally import[ing] or export[ing] a controlled substance * * * shall be punished" as provided in Section 960(b). Section 960(b), entitled "Penalties," then establishes a graduated series of penalties based on drug identity, drug quantity, and other factors, analogous to 21 U.S.C. 841(b). Accordingly, as in Section 841, the knowledge requirement set out in Section 960(a) does not extend to Section 960(b). A defendant need "know only that the substance he is dealing with is" an illegal drug. McFadden, 135 S. Ct. at 2304.

b. In contending otherwise, petitioners principally rely on a trio of cases that were decided before McFadden and do not call the applicability of that decision into question. Pet. 6-15 (citing Flores-Figueroa, supra, United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), and Alleyne v. United States, 570 U.S. 99 (2013)). Flores-Figueroa, which considered the reach of the term "knowingly" in the federal prohibition on aggravated identity theft, was cited in McFadden's own discussion of mens rea. 135 S. Ct. at 2304 (citation omitted). And X-Citement Video was decided

more than twenty years before McFadden and addressed a distinct federal statute governing child pornography.

Petitioners' reliance (Pet. 11-15) on Alleyne, which does not concern mens rea at all, is also misplaced. Alleyne held that "any fact that increases the mandatory minimum is an 'element' [of an offense] that must be submitted to the jury." 570 U.S. at 103. While that holding requires that drug types and quantities set out in Sections 841(b) and 960(b) that trigger higher sentencing ranges be submitted to the jury as a constitutional matter, Alleyne does not suggest that a statutory mens rea requirement in a different subsection applies to them as a statutory matter. See, e.g., United States v. Dado, 759 F.3d 550, 569-571 (6th Cir.), cert. denied, 574 U.S. 992 (2014) ("Alleyne did not rewrite § 841(b) to add a new mens rea requirement"); Gamez-Gonzalez, 319 F.3d at 700 (rejecting a similar argument based on Apprendi v. New Jersey, 530 U.S. 466 (2000)).

Petitioners do not identify any conflict in the circuits with respect to the application of the mens rea requirement in Sections 841 and 960. Even before McFadden, the circuits were uniform in rejecting the proposition that the government is required to prove beyond a reasonable doubt a defendant's knowledge of the drug type and quantity. See Dado, 759 F.3d at 569-571 (collecting cases). Indeed, McFadden referenced the uniform position of the circuits approvingly, 135 S. Ct. at 2304, and petitioners do not cite any

post-McFadden cases that have broken with the consensus. No further review of petitioners' statutory claim is warranted.

2. Petitioners' alternative constitutional argument likewise does not warrant further review. Petitioners assert (Pet. 15-16) that, if Sections 841(b) and 960(b) "do not require proof of knowledge of drug type or quantity, then [both statutes] violate[] the Due Process Clause by creating a strict liability offense punished by a mandatory minimum of ten years of imprisonment and the possibility of life in prison." Petitioners failed to raise any such argument below, and it was not passed on by the court of appeals. The Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). No reason exists to depart from that rule here.

In any event, petitioners' due process claim appears to rest on a mistaken premise. Sections 841 and 960 do not "'eliminat[e]'" the "'element of criminal intent,'" as petitioners assert. Pet. 15-16 (quoting United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985). Under both provisions, the government must establish that the defendant "knowingly or intentionally" committed a prohibited act that involved a "controlled substance." See McFadden, 135 S. Ct. 2303 (citation omitted). Although the government does not additionally need to prove the knowledge of the specific drug type or quantity, that does not create a strict

liability crime. And petitioner does not point to any precedents from this Court or the courts of appeals undermining the constitutionality of that statutory scheme.

3. Finally, petitioners err in asserting (Pet. 20) that this Court should grant their petition for a writ of certiorari, vacate the judgments below, and remand for reconsideration in light of Rehaif v. United States, 139 S. Ct. 2191 (2019). In Rehaif, this Court held that, in a prosecution for unlawful possession of a firearm or ammunition under 18 U.S.C. 922(g) and 924(a)(2), the government must prove a defendant's knowledge of his conduct and his status (e.g., that he is a felon or an alien illegally or unlawfully in the United States). 139 S. Ct. at 2194. Rehaif did not consider or cast any doubt on McFadden, which was decided only four years earlier.

Rehaif involved the interpretation of a different statutory scheme, in which Congress set out the penalties for "knowingly violat[ing]" Section 922(g) in Section 924(a)(2), and then included both conduct and status elements within Section 922(g). See Rehaif, 139 S. Ct. 2195-2196. No similar structure exists here, where McFadden recognized that the "ordinary meaning" of the statutory text dictated that the mens rea requirement is limited to Section 841(a). 135 S. Ct. at 2304. And, to the extent that Rehaif's reasoning was informed by the need to "separate wrongful from innocent acts," 139 S. Ct. at 2197, transporting a controlled substance across the Mexican border is not "entirely innocent"

conduct, ibid., even when the defendant does not know "precisely what substance it is," McFadden, 135 S. Ct. at 2304. Accordingly, no basis exists to vacate the judgments below and remand this petition to the court of appeals. Cf. Lawrence v. Chater, 516 U.S. 163, 173-174 (1996) (per curiam) (recognizing that the Court's power to grant, vacate, and remand in light of "intervening developments," "should be exercised sparingly," out of "[r]espect for lower courts" and for the "public interest in finality of judgments").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

PAUL T. CRANE
Attorney

JANUARY 2020