No. 19-6282

IN THE SUPREME COURT OF THE UNITED STATES

ALDO SALAZAR-MARTINEZ, 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

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QUESTION PRESENTED

Whether petitioners are entitled to plain error relief on their claim that conviction under 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. Morales-Gallegos, No. 18-cr-579 (Jan. 14, 2019)

United States v. Salazar-Martinez, No. 17-cr-909 (Feb. 8, 2019)

United States v. Robledo-Cuevas, No. 18-cr-400 (Feb. 11, 2019)

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

United States v. Morales-Gallegos, No. 19-40054 (July 26, 2019)

United States v. Salazar-Martinez, No. 19-40079 (July 26, 2019)

United States v. Robledo-Cuevas, No. 19-40171 (Aug. 16, 2019)

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A2, B1-B2, C1-C2) are not published in the Federal Reporter but are reprinted at 774 Fed. Appx. 192 (Salazar-Martinez), 774 Fed. Appx. 191 (Morales-Gallegos), and 774 Fed. Appx. 919 (Robledo-Cuevas).[1]

JURISDICTION

The judgment of the court of appeals with respect to petitioner Salazar-Martinez was entered on July 26, 2019. The

[1] Pursuant to this Court's Rule 12.4, petitioners are Aldo Salazar-Martinez, Ricardo Roosbel Morales-Gallegos, and Victor Manuel Robledo-Cuevas, who received separate judgments from the same court of appeals presenting closely related questions. See Pet. ii.

judgment of the court of appeals with respect to petitioner Morales-Gallegos was entered on July 26, 2019. The judgment of the court of appeals with respect to petitioner Robledo-Cuevas was entered on August 16, 2019. The petition for a writ of certiorari was filed on October 15, 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 Salazar-Martinez, Morales-Gallegos, and Robledo-Cuevas were convicted of violations of 21 U.S.C. 960 (2012 Supp. V 2017).[2] Salazar-Martinez Judgment 1; Morales-Gallegos Judgment 1; Robledo-Cuevas Judgment 1. Petitioner Salazar-Martinez was sentenced to 57 months of imprisonment, with no supervised release. Salazar-Martinez Judgment 2. Petitioner Morales-Gallegos was sentenced to 168 months of imprisonment, with no supervised release. Morales-Gallegos Judgment 2. Petitioner Robledo-Cuevas was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. Robledo-Cuevas Judgment 3-4. The court of appeals affirmed all three judgments. Pet. App. A1-A2, B1-B2, C1-C2.

1. a. Petitioner Salazar-Martinez drove a vehicle from Mexico to the Anzalduas, Texas port of entry with approximately

[2] For purposes of this brief, all references to 21 U.S.C. 960 are to the 2012 edition of the United States Code and Supplement V (2017) thereto.

3.5 kilograms of cocaine hidden in the vehicle. Salazar-Martinez Presentence Investigation Report (PSR) ¶¶ 8-9, 12. A grand jury in the Southern District of Texas returned a four-count indictment, which included (as relevant here) one count of importing 500 grams or more of cocaine into the United States from Mexico, in violation of 21 U.S.C. 952(a), 960(a)(1), and 960(b)(2). Salazar-Martinez Indictment 1-3. Pursuant to a plea agreement, Salazar-Martinez pleaded guilty to that count, and the government dismissed the remaining charges. Salazar-Martinez Judgment 1; Salazar-Martinez Plea Agreement 1-2.

Salazar-Martinez did not object in the district court to the factual basis of his guilty plea. Salazar-Martinez C.A. Letter Br. 3. During the re-arraignment hearing, the district court informed Salazar-Martinez that, pursuant to 21 U.S.C. 960(b)(2), he was subject to a statutory minimum term of imprisonment of five years and a statutory maximum term of imprisonment of 40 years. Salazar-Martinez Re-Arraignment Tr. 15-16. Salazar-Martinez did not object in the district court to the applicability of that statutory sentencing range. The district court determined that the statutory safety valve, 18 U.S.C. 3553(f)(2012), allowed for a sentence below the otherwise-applicable statutory minimum, and it sentenced Salazar-Martinez to 57 months of imprisonment. Salazar-Martinez Judgment 2; Salazar-Martinez Statement of Reasons 1.

b. Petitioner Morales-Gallegos drove a vehicle from Mexico to the Hidalgo, Texas port of entry with approximately 19.76 kilograms of methamphetamine hidden inside. Morales-Gallegos Presentence Investigation Report (PSR) ¶¶ 8, 9, 17. A grand jury in the Southern District of Texas returned a four-count indictment, which included (as relevant here) one count of importing 500 grams or more of methamphetamine into the United States from Mexico, in violation of 21 U.S.C. 952(a), 960(a)(1), and 960(b)(1). Morales-Gallegos Indictment 1-3. Pursuant to a plea agreement, Morales-Gallegos pleaded guilty to that count, and the government dismissed the remaining charges. Morales-Gallegos Judgment 1; Morales-Gallegos Plea Agreement 1-2.

Morales-Gallegos did not object in the district court to the factual basis of his guilty plea. Morales-Gallegos C.A. Letter Br. 3. During the re-arraignment hearing, the district court informed Salazar-Martinez that, pursuant to 21 U.S.C. 960(b)(1)(B), he was subject to a statutory minimum term of imprisonment of 10 years and a statutory maximum term of life. Morales-Gallegos Re-Arraignment Tr. 28-29. Morales-Gallegos did not object in the district court to the applicability of that statutory sentencing range. The district court sentenced Morales-Gallegos to 168 months of imprisonment. Morales-Gallegos Judgment 2.

c. Petitioner Robledo-Cuevas drove a vehicle from Mexico to the Lincoln-Juarez International Bridge with approximately 12.5

kilograms of cocaine hidden in the center console. Robledo-Cuevas Presentence Investigation Report (PSR) ¶¶ 6-7. A grand jury in the Southern District of Texas returned an indictment charging Robledo-Cuevas with conspiring to import five kilograms or more of cocaine into the United States from Mexico, in violation of 21 U.S.C. 952(a), 960(a)(1), 960(b)(1)(B), and 963, and 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 960(b)(1)(B). Robledo-Cuevas Indictment 1-2. Robledo-Cuevas pleaded guilty to both counts. Robledo-Cuevas Judgment 1; PSR ¶¶ 4-5.

Robledo-Cuevas did not object in the district court to the factual basis of his guilty plea. Robledo-Cuevas C.A. Letter Br. 3. During the re-arraignment hearing, the district court informed Robledo-Cuevas that, pursuant to 21 U.S.C. 960(b)(1), he was subject to a statutory minimum term of imprisonment of 10 years and a statutory maximum term of life. Robledo-Cuevas Re-Arraignment Tr. 11-12. Robledo-Cuevas did not object in the district court to the applicability of that statutory sentencing range. The district court determined that the statutory safety valve, 18 U.S.C. 3553(f)(2012), allowed for a sentence below the otherwise-applicable minimum, and it sentenced Robledo-Cuevas to 57 months of imprisonment, to be followed by three years of supervised release. Robledo-Cuevas Judgment 3-4; Robledo-Cuevas Statement of Reasons 1.

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. Salazar-Martinez C.A. Unopposed Mot. for Summ. Disposition 2-3; Morales-Gallegos C.A. Unopposed Mot. for Summ. Disposition 2-3; Robledo-Cuevas C.A. Unopposed Mot. for Summ. Disposition 2-3.

Each petitioner also filed a letter brief 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 each of their respective guilty pleas was insufficient because the government had failed to establish that they had knowledge of the drug type and quantity involved in their offenses. See Salazar-Martinez C.A. Letter Br. 3-10; Morales-Gallegos C.A. Letter Br. 3-10; Robledo-Cuevas C.A. Letter Br. 3-10. All three petitioners acknowledged that, because they had not raised their objections in the district court, their claims were reviewable only for plain error. See Salazar-Martinez C.A. Letter Br. 3; Morales-Gallegos C.A. Letter Br. 3; Robledo-Cuevas C.A. Letter Br. 3. Petitioners also recognized that their arguments were foreclosed by the court of appeals' prior decision in United States v. Betancourt, 586 F.3d 303 (5th Cir. 2009), cert. denied, 559 U.S. 1021 (2010), which had reaffirmed, after Flores-Figueroa, that knowledge of drug type and quantity is not an element of the offense under 21 U.S.C. 841.

Id. at 308-309; see Pet. App. A1-A2, B1-B2, C1-C2. Petitioners further acknowledged that the court of appeals had applied the reasoning of Betancourt to 21 U.S.C. 960 in United States v. Zuniga-Martinez, 512 Fed. Appx. 428, 428-429 (5th Cir.)(per curiam), cert. denied, 569 U.S. 941 (2013). See, e.g., Salazar-Martinez C.A. Letter Br. 7.

Relying on Betancourt, the court of appeals summarily affirmed all three judgments of conviction. Pet. App. A1-A2, B1-B2, C1-C2.

ARGUMENT

Petitioners contend (Pet. 6-16) that, under the reasoning of Flores-Figueroa v. United States, 556 U.S. 646 (2009), a drug conviction under 21 U.S.C. 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) -- which petitioners recognize (Pet. 6) to be "analogous" to 21 U.S.C. 960 -- "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. 16-18) that, if proof of knowledge of drug type and quantity is not required, convictions under 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,[3] and should follow the same course here.

1. Petitioners assert (Pet. 6-16) that 21 U.S.C. 960 requires proof beyond a reasonable doubt that they knew the specific drug type and quantity involved in their offenses. That contention, which they have acknowledged is subject to review only for plain error, see p. 6, supra, is foreclosed by McFadden.

a. In McFadden, this Court considered the scope of the knowledge requirement in Section 841(a), which establishes the mens rea requirement for the Controlled Substances Act, 21 U.S.C. 801 et seq., and the Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. E (1201 et seq.), 100 Stat. 3207-13, 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." 21 U.S.C. 841(a). Section 841(b) then describes (with certain exceptions) how a person who violates Section 841(a) "shall be sentenced" by

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[3] 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). A similar question is raised in Garcia v. United States, petition for cert. pending, No. 18-9699 (filed June 5, 2019).

specifying different maximum and minimum sentences for particular types and quantities of drugs. 11 U.S.C. 841(b).

In McFadden, the Court explained that "[t]he ordinary meaning" of Section 841(a) "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. McFadden reasoned that, "[u]nder the most natural reading" of Section 841(a), the term "'knowingly' applies" to the term "controlled substance," such that a defendant must know that he is dealing with "'a controlled substance.'" Ibid. And the Court determined that Section 841(a)'s 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, forecloses petitioners' claim (Pet. 6) that their convictions

required knowledge of "drug type and drug quantity." Although petitioners were convicted under Section 960 rather than Section 841, they acknowledge (Pet. 6) that Section 960 is "analogous" to Section 841, and their petition incorporates the premise that the two provisions impose the same mens rea requirement. That premise is correct, as the two statutes are structured very similarly. Section 960(a), entitled "Unlawful acts," contains language similar to Section 841(a): It 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). 21 U.S.C. 960(a) (emphasis added). 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).

McFadden's conclusion that the knowledge requirement in Section 841(a) applies to the term "controlled substance," and requires the defendant only to "kn[ow] he possessed a substance listed on the [federal drug] schedules," 135 S. Ct. 2304, therefore applies with equal force to Section 960(a). Just as the term "knowingly" in Section 841(a) does not apply to the drug types and quantities set out in Section 841(b), the term "knowingly" in Section 960(a) does not apply to the drug type and quantity requirements set out in Section 960(b). A defendant need "know only that the substance he is dealing with is" an illegal drug. Ibid.

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. 12-16) 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 Section 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); Gamez-Gonzalez, 319 F.3d at 700 (rejecting a similar argument based on Apprendi v. New Jersey, 530 U.S. 466 (2000)).

Petitioners are also mistaken in their assertion (Pet. 6-10) that the Court's recent decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), supports their argument. 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. Rather, 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). Id. at 2195-2196. No similar structure exists here. As explained above, see p. 10, supra, Section 960's structure is instead analogous to Section 841's: Congress clearly delineated "unlawful acts" and "penalties" in Sections 841 and 960, and required proof of knowledge only with respect to the "unlawful acts" set forth in Sections 841(a) and 960(a). Moreover, 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 "innocent conduct," id. at 2211, even when the defendant does not know "precisely what substance it is," McFadden, 135 S. Ct. at 2304.

c. Petitioners do not identify any division in the circuits regarding the mens rea requirement for Section 960. They instead cite (Pet. 18-20) only a dissent and a concurrence regarding the mens rea requirement in Section 841. But 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 drug type and quantity under Section 841. 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. 16-18) that, if Section 960(b) "does not require proof of knowledge of drug type or quantity, then the statute violates the Due Process Clause by creating a strict liability offense punished by a mandatory minimum of ten (or five) years of imprisonment and the possibility of life (or 40 years) in prison." Petitioners failed to raise any such argument in the lower courts, 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. Section 960 does not "'eliminat[e]'" the "'element of criminal intent,'" as petitioners assert. Pet. 18 (quoting United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985)). Under the statute, the government must establish that the defendant "knowingly or intentionally" committed a prohibited act that involved a "controlled substance." 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2020