No. 20-7958

IN THE SUPREME COURT OF THE UNITED STATES

ANDERSON JEAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in declining to grant plain-error relief on petitioner's claim that his guilty plea for violating 8 U.S.C. 1327 required a specific admission not only of knowledge that he was smuggling an inadmissible noncitizen into the United States, but also specific knowledge that the noncitizen had a prior conviction for an "aggravated felony."

ADDITIONAL RELATED PROCEEEDING

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

United States v. Jean, No. 15-cr-20914 (Sept. 26, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not reported but is reprinted at 838 Fed. Appx. 370.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 2020. A petition for rehearing was denied on January 26, 2021. Pet. App. A6. The petition for a writ of certiorari was filed on April 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of encouraging or inducing a noncitizen to enter the United States illegally, in violation of 8 U.S.C. 1324(a)(1)(A)(iv), and one count of aiding or assisting the unlawful entry of a noncitizen who is inadmissible under certain immigration provisions, in violation of 8 U.S.C. 1327. Judgment 1.* He was sentenced to 84 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A5.

1. In March 2015, the Coast Guard intercepted a vessel traveling in international waters toward Miami, Florida, without navigational lights. Pet. App. A1. The vessel did not immediately stop when the Coast Guard ship activated its lights and sirens. Ibid. When the vessel finally complied, Coast Guard agents boarded and determined that petitioner, who was in possession of $6000 in cash, was the master of the vessel. Ibid. The vessel was also carrying 12 noncitizens, none of whom had permission to enter the United States. Ibid.

Several passengers identified petitioner as the operator of the vessel and stated that they had paid money to a smuggler in

* This brief uses "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

the Bahamas to be transported to the United States. Pet. App. A1. One of those passengers, Christoval Reece, had previously been removed from the United States by immigration authorities following a conviction for an aggravated felony. Ibid.

2. Petitioner was charged with twelve counts of encouraging or inducing a noncitizen to enter the United States illegally, in violation of Section 1324(a)(1)(A)(iv), and one count of aiding or assisting the unlawful entry of a noncitizen (Reece) who was inadmissible under certain immigration provisions, in violation of Section 1327. The latter provision, which is at issue here, provides:

> Any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or 1182(a)(3) (other than subparagraph (E) thereof) of this title to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined under title 18, or imprisoned not more than 10 years, or both.

8 U.S.C. 1327. Sections 1182(a)(2) and (3) establish general categories of noncitizens who are inadmissible to the United States based on prior criminal activity or security concerns. 8 U.S.C. 1182(a)(2)-(3). The definition of "aggravated felony" appears in 8 U.S.C. 1101(a)(43).

Pursuant to a plea agreement, petitioner pleaded guilty to a single count of violating 1324(a)(1)(A)(iv) and to the Section 1327 count. Pet. App. A1. In exchange, the government agreed to

dismiss the remaining counts, recommend that a reduction be applied to petitioner's Guidelines calculations, and further recommend that his sentences run concurrently with those imposed in two other, unrelated criminal cases. Ibid. In connection with the plea agreement, petitioner executed a written factual proffer describing the facts recounted above. Factual Proffer 1-2. He also agreed, inter alia, to "waive[] all rights conferred by [28 U.S.C.] 1291 to assert any claim that * * * the admitted conduct does not fall within the scope of the statute of conviction." Plea Agreement 6.

During the plea colloquy, the district court asked petitioner whether he knew that he was "charged with having encouraged and induced several aliens to come into the United States, including at least one inadmissible alien." Plea Colloquy Tr. 12 (July 15, 2019). Petitioner replied, "I understand the case, but I do not know those people." Ibid. The court responded that it did not "care whether you know them or not," and asked if petitioner "underst[oo]d those are the charges against you?" Ibid. Petitioner answered, "Yes, ma'am." Ibid. The court then reviewed the plea agreement and the factual proffer with petitioner, who agreed with the facts therein. Id. at 9-15, 22; Pet. App. A2. Petitioner did not object at any point. Pet. App. A2. The court accepted petitioner's plea. Ibid.

3. The court of appeals affirmed. Pet. App. A1-A5.

As relevant here, petitioner argued that Section 1327 requires the government to prove that a defendant knew the noncitizen he smuggled into the United States had previously been convicted of an aggravated felony, and contended that the district court violated Federal Rule of Criminal Procedure 11 by failing either to inform petitioner of this element or confirm the existence of a factual basis for it. Pet. App. A2-A4. Although the plea agreement included a waiver of petitioner's right to appeal the factual basis for his plea, the court of appeals refused to enforce that waiver, citing circuit precedent. See id. at A5 n.1. But because petitioner had not raised an objection in the district court, the court of appeals reviewed for plain error, id. at A2, and found none, see id. at A2-A4.

Citing its previous decision in United States v. Lopez, 590 F.3d 1238 (11th Cir. 2009), cert. denied, 562 U.S. 981 (2010), the court of appeals explained that petitioner's conviction under Section 1327 required an admission that (1) he knowingly aided or assisted a noncitizen in entering the United States; (2) he knew that the noncitizen was inadmissible; and (3) the noncitizen was inadmissible under 8 U.S.C. 1182(a)(2) for having been convicted of an aggravated felony. Pet. App. A3. And the court rejected petitioner's argument that Rehaif v. United States, 139 S. Ct. 2191 (2019), and McFadden v. United States, 576 U.S. 186 (2015), abrogated Lopez and added a further element of knowledge of the

noncitizen's prior conviction for an aggravated felony. Pet. App. A3. The court observed that Rehaif and McFadden had involved different statutory provisions with different wordings, structures, and locations in the criminal code. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 6-20) that his conviction under 8 U.S.C. 1327 required proof not only that he knew that he was smuggling an inadmissible noncitizen into the United States, but that he also specifically knew that the noncitizen had a prior conviction for an "aggravated felony." That contention does not warrant further review. The decision below is consistent with the decisions of this Court and of the other courts of appeals to address the issue. This case would also be a poor vehicle for resolving the question presented.

1. The decision below reflects the unanimous consensus of every court of appeals to have addressed the question presented that conviction under Section 1327 does not require proof of specific knowledge that the smuggled noncitizen was inadmissible due to a conviction for a prior "aggravated felony." See United States v. Figueroa, 165 F.3d 111 (2d Cir. 1998) (Sotomayor, J.); United States v. Flores-Garcia, 198 F.3d 1119 (9th Cir. 2000); see also United States v. Lopez, 590 F.3d 1238, 1254-1255 (11th Cir. 2009) (relying on Figueroa and Flores-Garcia).

In United States v. Figueroa, for example, the Second Circuit observed that "for knowledge to suffice for criminal culpability, it should, at minimum, be extensive enough to attribute to the knower a 'guilty mind,' or knowledge that he or she is performing a wrongful act," but generally "should be presumed to stop once a defendant is put on notice that he is committing a non-innocent act." 165 F.3d at 115, 117. It accordingly determined that the statute's knowledge element extended to the noncitizen's inadmissibility, but did not extend further, because "knowledge that an alien is excludable should put any reasonable person on notice that it would be illegal to aid that person's entry into the country." Id. at 118. Observing that Section 1324 penalizes encouraging a noncitizen to enter the United States with knowledge, or in reckless disregard, of the entry's illegality, the court reasoned that Section 1327 "generates incentives for § 1324 violators to find out whether they are assisting an alien felon into the country and to avoid aiding aliens in this narrow class." Id. at 119; see Flores-Garcia, 198 F.3d at 1121-1123 (reasoning similarly).

Both the Second Circuit in Figueroa and the Ninth Circuit in United States v. Flores-Garcia found support for that determination in this Court's decision in United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), which addressed a criminal provision covering "[a]ny person who * * * knowingly

transports or ships" in "interstate or foreign commerce by any means including by computer or mails, any visual depiction, if * * * the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252(a)(1)(A); see Figueroa, 165 F.3d at 117; Flores-Garcia, 198 F.3d at 1122. The Court held in X-Citement Video that the statute's knowledge requirement "extends both to the sexually explicit nature of the material and to the age of the performers." 513 U.S. at 78. In doing so, the Court explained that the "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct" and distinguished the victim's age from a "'jurisdictional fact' that enhances an offense otherwise committed with an evil intent." Id. at 72 n.3.

Here, in contrast, the precise ground -- e.g., conviction of an "aggravated felony" -- for a noncitizen's inadmissibility serves to aggravate the offense. As X-Citement Video makes clear, while "[c]riminal intent serves to separate those who understand the wrongful nature of their act from those who do not," it "does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful." 513 U.S. at 73 n.3. And knowledge of details of a prior conviction sufficient to classify for legal purposes as an "aggravated felony" conviction

does not meaningfully alter the wrongfulness of knowingly smuggling an inadmissible noncitizen into the United States.

2. Petitioner's contrary argument principally relies on Flores-Figueroa v. United States, 556 U.S. 646 (2009); McFadden v. United States, 576 U.S. 186 (2015); and Rehaif v. United States, 139 S. Ct. 2191 (2019). See Pet. 6-8. None of those decisions requires a different result in this case.

In Flores-Figueroa, the Court interpreted a statute penalizing a person who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," 18 U.S.C. 1028A(a)(1), to require a showing that the defendant knew the relevant means of identification belonged to "another person." 556 U.S. at 647. Although the Court observed that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element," it did not purport to prejudge the issue as to all statutes, instead recognizing that "the inquiry into a sentence's meaning is a contextual one." Id. at 652. And in a separate opinion, Justice Alito identified Section 1327 as an example of an "instance[] in which context may well rebut th[e] presumption" that a "specified mens rea applies to all the elements of an offense." Id. at 660 (Alito, J., concurring in part and concurring in the judgment) (emphasis omitted).

In McFadden, the Court interpreted the Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), which instructs courts to treat substances substantially similar to those listed on the federal controlled substance schedules (if intended for human consumption) as controlled substances. The Controlled Substances Act, in turn, makes it unlawful knowingly to distribute controlled substances. 576 U.S. at 188. The Court held that the government must show that the defendant knew the substance was controlled or knew the specific features of the substance that made it controlled. Id. at 188-189. The Court's analysis of the specific language and structure of the statute there, see id. at 191-194, does not control the analysis of the differently worded and structured Section 1327, and the Court's holding is consistent with the decision below in this case. Knowledge that a substance is a controlled substance is necessary to differentiate wrongful conduct from the innocent activity of distributing non-controlled substances.

And most recently, in Rehaif, the Court held that, in a prosecution for unlawful possession of a firearm under 18 U.S.C. 922(g) and 924(a)(2), the government must prove a defendant's knowledge of both his conduct and status (e.g., that he is a noncitizen unlawfully present in the United States). 139 S. Ct. at 2194. The Court reiterated the presumption "that Congress intends to require a defendant to possess a culpable mental state

regarding 'each of the statutory elements that criminalize otherwise innocent conduct,'" id. at 2195 (quoting X-Citement Video, 513 U.S. at 72); observed that "the possession of a gun can be entirely innocent," id. at 2197; and observed that in the context of a prosecution under 18 U.S.C. 922(g) and 924(a)(2), "the defendant's status is the 'crucial element' separating innocent from wrongful conduct," ibid. (quoting X-Citement Video, 513 U.S. at 73). The Court also noted, citing Justice Alito's Flores-Figueroa concurrence, that Rehaif was "not a case where the modifier 'knowingly' introduces a long statutory phrase, such that questions may reasonably arise about how far into the statute the modifier extends." Id. at 2196.

To the extent that petitioner focuses on Section 1327 itself, he provides no meaningful independent support for his claim. His reliance (Pet. 10-11) on Section 1327 having a higher statutory maximum than Section 1324 overreads Staples v. United States, 511 U.S. 600 (1994), which construed a statute that did not explicitly provide any mens rea that would have separated innocent from non-innocent conduct. Id. at 605. Staples does not undermine the principle that, in construing the scope of a statute's mens rea requirement, no awareness of the "precise consequences that may flow from" a knowingly non-innocent act is presumptively required. X-Citement Video, 513 U.S. at 73 n.3; cf. United States v. Burwell, 690 F.3d 500, 528 (D.C. Cir. 2012) (Kavanaugh, J., dissenting)

(taking view that mens rea presumption would apply to avoid "extraordinary result" of "an extra 20 years of mandatory imprisonment"), cert. denied, 568 U.S. 1196 (2013). And the treatment of facts that increase the statutory maximum as elements for certain constitutional purposes, see Pet. 13-14 (citing Apprendi v. New Jersey, 530 U.S. 466 (2000)), has no meaningful bearing on how far a statute's knowledge requirement extends.

3. Petitioner does not allege that the decision below conflicts with decisions from any other circuit, or even that it has arisen with sufficient frequency to generate precedent in more than three circuits. And in any event, even if the question presented might otherwise warrant review, this case would be a poor vehicle for addressing it.

As a threshold matter, although the court of appeals refused (Pet. App. A5 n.1) to apply the appeal waiver in petitioner's plea agreement -- in which petitioner specifically agreed to waive his right to argue that the admitted conduct does not fall within the scope of Section 1327, see Plea Agreement 6 -- that waiver would properly preclude review of the question presented insofar as petitioner challenges the factual basis for his plea.

In addition, as the court of appeals recognized (Pet. App. A2), because petitioner failed to preserve his claim before the district court, his claim is reviewable only for plain error. See

Fed. R. Crim. P. 52(b). And particularly in light of the uniform consensus in the courts of appeals, petitioner could not show any error that is sufficiently "clear" or "obvious" to satisfy the demanding requirements of plain-error review. Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904 (2018) (citation omitted); see United States v. Williams, 469 F.3d 963, 966 (11th Cir. 2006) (per curiam) ("[W]here neither the Supreme Court nor this Court has ever resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue.") (citation omitted; brackets in original); United States v. Teague, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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