NO: 20-7958

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

ANDERSON JEAN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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1. The government fails to acknowledge the "significant tension" between this Court's precedent and the three courts of appeals cases on which it relies.

Viewed narrowly, the question presented here is whether the word "knowingly" in 8 U.S.C. § 1327, which criminalizes smuggling into the United States a noncitizen who has a prior conviction for an "aggravated felony," requires the government to prove that the defendant knew that the noncitizen he was smuggling into the United had a prior conviction for an aggravated felony. Viewed more broadly, the question presented is an important one which continues to divide jurists: does grammar, and context, determine whether the introductory word "knowingly" in a criminal statute requires the government to prove the defendant's knowledge of an element of an offense stated later in the text, or is government only required to prove knowledge when necessary to distinguish between wrongful and wholly innocent conduct. *See United States v. Collazo*, 984 F.3d 1308, 1325 (9th Cir. 2021) (en banc); *United States v. Price*, 980 F.3d 1211,1219-22 (9th Cir. 2019) (en banc); *United States v. Brooks*, 681 F.3d 678, 703-04 (5th Cir. 2012) ("Overall, it is not clear whether knowledge applies to the [element at issue].") (cited in Jean's Petition for a Writ of Certiorari ("Pet.") at 8-9.

In his Petition, Jean argued that the significantly increased severity of punishment associated with an essential element of an offense confirms the result toward which ordinary grammar points, namely, that the word "knowingly" in a statute requires proof of a defendant's *mens rea* with respect to this element. Here, 8 U.S.C. § 1324, establishes a five-year maximum for the offense of smuggling a noncitizen who is undocumented, but § 1327 establishes a punishment twice as severe as § 1324 – 10 years, instead of five years – for the offense of smuggling a noncitizen who is not

merely undocumented, but an aggravated felon. Jean maintains that the word "knowingly" therefore requires the government to prove Jean's knowledge of the noncitizen's aggravated felon status in order to convict him under § 1327.

The government disagrees, but its argument in its Brief in Opposition ("Opp.") further demonstrates that the question presented is worthy of resolution by this Court.

The government's argument begins by stating that "[t]he 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.'" Opp. 6 (citing *United States v. Figueroa*, 165 F.3d 111 (2d Cir. 1998); *United States v. Flores-Garcia*, 198 F.3d 1119 (9th Cir. 2000); and *United States v. Lopez*, 590 F.3d 1238 (11th Cir. 2009)). In his Petition, Jean pointed out that the reasoning in each of these three cases -- *Lopez*, *Figueroa*, and *Flores-Garcia* – is "in significant tension" with *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). Pet. 15 (quoting Leonid Traps, *"Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal Law After Flores-Figueroa*, 112 Colum. L. Rev. 628, 654-55 (2012)). The government fails to address the tension between *Flores-Figueroa* and these three earlier Circuit Court holdings.

The three cases upon which the government relies found that the word "knowingly" required in a § 1327 offense does not require proof of a defendant's knowledge that a smuggled noncitizen is an aggravated felon, because a defendant who is smuggling an undocumented alien is already "on notice that he is committing a non-innocent act." Opp. 7 (quoting *Figueroa*, 165 F.3d at 115, 117). In *Flores-Figueroa*, in this Court (eleven years after *Figueroa*), the government made this very argument, claiming that the word "knowingly" should be interpreted to require proof of scienter only

when necessary to separate wrongful conduct from otherwise innocent conduct. *Brief for the United States* in *Flores-Figueroa v. United States*, 2009 WL 191837 at * 7-8 (Jan. 23, 2009). But *Flores-Figueroa* ruled against the government "based on an altogether different consideration: text." Traps, *Knowingly Ignorant* 112 Colum L. Rev. at 642-43; *see United States v. Burwell*, 690 F.3d 500, 529 (D.C. Cir. 2012) (en banc) (Kavanaugh, J, dissenting) (noting that in *Flores-Figueroa* the government relied on the distinction between wrongful conduct and innocent activity to argue that the statute did not require proof of knowledge of the element at issue, and that this argument "garnered zero votes in the Supreme Court.").

Flores-Figueroa is not this Court's only case to have rejected the wrongful/innocent conduct distinction as the basis for interpreting the word "knowingly" in a statute. In *Staples v. United States*, the district court had agreed with the government, and rejected the defendant's proposed jury instruction that the government must prove that he knew "the gun would fire fully automatically," ruling that it was "enough [for the government] to prove [that the defendant] knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation." 511 U.S. 600, 604 (1994). This ruling was affirmed on appeal. *Id*. Reversing, *Staples* held that the government was required to prove that the defendant knew that the weapon he possessed had the characteristics of a machine gun. *Id*. Similarly, *McFadden v. United States*, 576 U.S. 186, 195 (2015) rejected the government's argument that 21 U.S.C. § 841(a)(1)'s knowledge requirement as applied to analogue controlled substances is satisfied if "the defendant knew he was dealing with an illegal or regulated substance." *See id*. at 191 (citing *Flores-Figueroa*, 556 U.S. at 650).

2. The government fails to explain why the "context" of the word "knowingly" § 1327 means that it does not require proof of *mens rea*.

The government acknowledges *Flores-Figueroa*'s statement 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." Opp. 9 (quoting *Flores-Figueroa*, 556 U.S. at 652). The government fails to explain why, in the present case, this holding should not govern the interpretation of the word "knowingly" in § 1327 and require proof of *mens rea*.

The government notes that "the inquiry into a sentence's meaning is a contextual one," Opp. 9 (quoting *Flores-Figueroa*, 556 U.S. at 652). But, aside from quoting the Eleventh Circuit's finding that the statute at issue here is "differently worded and structured" than the statute at issue in *Flores-Figueroa*, (Opp. 10), the government offers *no* guidance regarding how the contextual inquiry is to be conducted. Yet, this Court's precedent provide guidance on this question. This Court has made clear that the word "knowingly" applies to an element of an offense when proof of this element results in significant punishment.

In *Staples v. United States*, this Court stated:

> The potentially harsh penalty attached to violation of § 5861(d) – up to 10 years' imprisonment – confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*.

511 U.S. at 616; *see id*. at 617 n. 15 (citing *United States v. United States Gypsum*, 438 U.S. 422, 437, 442 n. 18 (1978)). In *United States v. X-Citement Video, Inc*., this Court noted, and relied on, "*Staples*' concern with harsh penalties looms large respecting [the statute at issue]: violations are

punishable by up to 10 years in prison as well as substantial fines and forfeiture." 513 U.S. 64, 72 (1994).

Here, the government does not dispute that the "aggravated felony" status of the noncitizen is *the* element that distinguishes § 1327 from § 1324, and acknowledges that § 1327 has "a higher statutory maximum than Section 1324." Opp. 11. But the government avoids the natural conclusion that the word "knowingly" in § 1327 requires proof that an noncitizen smuggler knew that a smuggled noncitizen was an aggravated felon, by claiming that, under this Court's precedents, proof of knowledge is only necessary "to differentiate *wrongful* conduct from . . . *innocent* activity." Opp. 10 (emphasis added). The government claims that knowledge of whether the noncitizen being smuggled is an aggravated felon "does not *meaningfully* alter the wrongfulness of knowingly smuggling an inadmissible noncitizen into the United States." Opp. 8-9 (emphasis added). Jean disagrees. As noted above, under this Court's precedent, the ten-year maximum for violating § 1327 is punishment that "meaningfully" indicates that the government must prove the defendant's knowledge.

Grammar, moreover, is a guide with regard to whether the word "knowingly" applies to an element stated later in the text of a statute. *X-Citement Video* held that "as a matter of grammar" it made sense to read the word "knowingly" as modifying both the elements of the subsections of the statute: the "depiction" of "sexually explicit conduct," and the "age of the performers." 513 U.S. at 77-78. Here, the word "knowingly" in § 1327 should be read as modifying the phrase, just three words later in the sentence, that reads: "any noncitizen inadmissible under section 1182(a)(2) (insofar as an noncitizen inadmissible under such section has been convicted of an aggravated felony) . . .". *Compare Rehaif v. United States*, __ U.S. __, 139 S.Ct. 2191, 2196 (2019) ("This is

notably 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.").

Finally, it bears noting that the government does not argue that as a practical matter it would be difficult to prove whether a smuggler knew that a noncitizen was an aggravated felon. *Cf. Flores-Figueroa*, 556 U.S. at 656 (rejecting the government's reliance on "difficulties of proof" as a basis for interpreting the statute's *mens rea*).

3. *X-Citement Video* did not hold that the scope of a defendant's *mens rea* is unrelated to the sentencing consequences of his conduct.

The government's second argument to avoid *Flores-Figueroa* is to claim that footnote 3 in *X-Citement Video, Inc*., stands for "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." Opp. 11 (quoting footnote 3 in *X-Citement Video*). The government reads the words "precise consequences" to refer to potential *sentencing* consequences. Opp. 11. But this footnote does not address the sentencing consequences of criminal conduct.

In footnote 3, *X-Citement Video* first distinguished between "jurisdictional facts" and other elements of a criminal offense. *Id*. at 73, n.3. This distinction is inapposite here, since (1) the aggravated felon status of the noncitizen is not a jurisdictional fact; and (2) a jurisdictional fact does not have sentencing consequences. Footnote 3 then stated: "Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful." *Id*. This statement is followed by a citation to *Hamling v. United States*, 418 U.S. 87, 120 (1974). *Id*. In *Hamling*, this Court held that what is "obscene" for purposes of a criminal

statute is determined based on the subjective belief of the person who put material in the mail regarding whether the material was obscene. 418 U.S. at 120. Thus, *Hamling* was distinguishing between the subjective beliefs of the defendant, and the objective criteria regarding what made material "obscene." Again, this did not bear on the severity of punishment.

In his Petition (Pet. 13-14) , Jean noted that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), implicitly rejected the view that, for purposes of § 1327, the aggravated felon status of a noncitizen merely "serves to aggravate the offense" – as the government now puts it. Opp. 8. The government maintains that "the treatment of facts that increase the statutory maximum as elements for certain constitutional purposes . . . has no meaningful bearing on how far a statute's knowledge requirement extends." Opp. 12 (citing *Apprendi*). But if, to obtain a conviction under § 1327, the aggravated felon status of the smuggled noncitizen is a material element of the offense, which must be proven to a jury beyond a reasonable doubt, it makes sense to require the government to prove that the defendant was aware of this material aspect of his conduct. Would it not be odd for the Constitution to require the jury to trouble itself with determining whether the alien being smuggled was an "aggravated felon," yet hold that the defendant charged with this crime could be wholly unaware of the alien's "aggravated felon" status?

4. The present case is a sound vehicle for considering the question presented.

Finally, the government asserts that this case would be a "poor vehicle" for addressing the issue presented. Opp. 12. The government states: "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." Opp. 12. But the Eleventh Circuit here disposed of the government's waiver argument in a footnote, and reached the merits of the question presented here. Pet. App. A5 n. 1(citing *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1287 (11th Cir. 2015). The government cites no case from any Circuit that holds that a defendant can waive the question whether the admitted conduct fell within the scope of the statute of conviction. *Puentes-Hurtado* (and other courts) rejected the view that the question whether there was an insufficient factual basis is independent from whether the plea was voluntary and intelligent. 794 F3d. at 1286; *see Class v. United States*, 138 S. Ct. 798, 809 (2018) (Alito, J. dissenting) (a guilty plea relinquishes all nonjurisdictional challenges to a conviction "except for the claim that [the defendant's] plea was not voluntary and intelligent").

The government also claims that Jean's case is a poor vehicle because, in light of circuit court caselaw, he "could not show any error that is sufficiently 'clear' or obvious' to satisfy the demanding requirements of plain-error review [in the Eleventh Circuit]." Opp. 3. The first of the four elements of plain error is whether there is "an error," and the second element is whether this error is "plain" or "obvious." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1904 (2018) (citation omitted). Here, this Court, after considering the question presented, could decide that there was "an error" in the factual basis for the § 1327 plea, and further decide that this error was "plain" or "obvious" in light of (1) the above-cited Columbia Law Review article which, already in 2012, drew attention to the "significant tension" between *Flores-Figueroa* and the earlier cases decided in three Circuits; (2) the subsequent reaffirmation of *Flores-Figueroa* by this Court in *McFadden*, 576 U.S. at 190, and *Rehaif*, 139 S.Ct. at 2196; (3) the increased severity of punishment associated with the element

at issue; and (4) the close proximity of the word "knowingly" to the "aggravated felony" phrase in the text of § 1327.

Alternatively, having decided that there was an error, *i.e.,* having determined that the first element of "plain error" is satisfied, this Court could then remand the case to the Eleventh Circuit for application of the remaining "plain error" factors. The Eleventh Circuit, in turn, would find that the error is "plain" in light of this Court's decision here. *See Henderson v. United States*, 568 U.S. 266 (2013) (an error is plain within the meaning of the rule governing plain error review as long as the error was plain at the time of appellate review). The Eleventh Circuit would then turn to the remaining two plain error factors. *Cf. Hicks v. United States*, 137 S.Ct. 2000 (2017) (accepting the Solicitor General's position that the case met the first two elements of plain error, and its request to remand the case to the Court of Appeals for consideration of the remaining third and fourth plain elements). Finally, even were Jean to establish "error" but fail to establish that this error is "plain" and therefore ultimately fail to reduce his 84-month sentence, this outcome, though bitterly disappointing, would not then turn his case into a "poor vehicle" for this Court's consideration of the question presented.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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