No. 21-5016

IN THE SUPREME COURT OF THE UNITED STATES

SALVADOR ACOSTA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the district court's omission of a particular limiting instruction was harmless error.

2. Whether petitioner is entitled to plain error relief on his claim that a 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. Cal.):

United States v. Acosta, No. 17-cr-3289 (Jan. 10, 2019)

United States Court of Appeals (9th Cir.):

United States v. Acosta, No. 19-50007 (Dec. 15, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted at 839 Fed. Appx. 87. The judgment of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2020. A petition for rehearing was denied on February 22, 2021 (Pet. App. 6). The petition for a writ of certiorari was filed on July 1, 2021. 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 Southern District of California, petitioner was convicted of importing 400 grams or more of fentanyl, in violation of 21 U.S.C. 952 and 960. Judgment 1; C.A. E.R. 174. He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-5.

1. On September 15, 2017, at around 4:30 in the morning, petitioner arrived at the San Ysidro, California, port of entry from Mexico. C.A. Supp. E.R. 145. Petitioner was traveling in his car, a Toyota Prius, which bore Uber and Lyft decals on the windshield. Id. at 156. At the port of entry, petitioner told a U.S. Customs and Border Protection (CBP) officer that he was going to "Chula Vista and then to work" at his job as a chef at the Pechanga Resort Casino, which is located approximately 70 miles from the border. Id. at 152; see id. at 146-147, 150-152, 176.

The CBP officer inspected the car and noticed "a strong odor of soap" in the rear cargo area. C.A. Supp. E.R. 153. The smell raised the officer's suspicions because soap is a common "masking agent" used by drug traffickers. Ibid.; see also id. at 160. When the officer opened the Prius' spare-tire compartment, he discovered several black plastic bags containing plastic packages. Id. at 153-155. The packages contained 35 pounds of fentanyl,

with a street value of approximately $4.5 million. Id. at 164-165, 214. Petitioner was arrested. Id. at 190.

Later that day, petitioner was interviewed by an officer from Homeland Security Investigations (HSI). C.A. Supp. E.R. 174-176. Petitioner told the officer that, at the time of his arrest, he had been going "straight to work." Id. at 264; see id. at 175. When the officer reminded him that he had previously stated he was going to Chula Vista and then to work, petitioner stated that he might have been going to get coffee at a McDonalds in San Ysidro, a location that petitioner acknowledged is not in Chula Vista. Id. at 264; see id. at 175-176.

HSI officers later obtained petitioner's border-crossing records, which reflected "numerous entries * * * in the Toyota Prius" in the months preceding his arrest. C.A. Supp. E.R. 182; see id. at 176-177. In addition, the agents obtained a warrant to search the contents of two smartphones seized from petitioner when he was arrested. Id. at 182. One of the phones contained a Spanish-language exchange, conducted over Facebook Messenger, between petitioner and an individual listed as "Alberto Aldana," in which petitioner referenced six "botes" ("boats" or "container[s]"), a term used by drug traffickers to refer to containers of "1,000 pills of ecstasy." Id. at 182-184, 198-199, 209. The search of petitioner's phones also revealed approximately 13 phone calls with "Alberto" the evening before petitioner's arrest. Id. at 184-185.

2. A grand jury charged petitioner with importing 400 grams or more of fentanyl, in violation of 21 U.S.C. 952 and 960. C.A. E.R. 174.

Before trial, the government filed a motion proposing to admit evidence of petitioner's prior border crossings under Federal Rule of Evidence 404(b), D. Ct. Doc. 17-1, at 6 (Nov. 3, 2017), which allows the introduction of evidence of a defendant's prior bad acts for non-propensity purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident," Fed. R. Evid. 404(b)(2); Huddleston v. United States, 485 U.S. 681, 692 (1988). The government explained that it sought to introduce the prior border crossings to show "knowledge, intent and absence of mistake or accident." D. Ct. Doc. 17-1, at 6. Petitioner did not oppose the motion, and in a pre-trial hearing, he indicated that he did not have "any problem" with the government's introduction of such evidence through a stipulation or an independent witness. 8/3/2018 Tr. at 30.

At trial, the government introduced uncontested evidence that petitioner had attempted to cross the border with approximately $4.5 million worth of fentanyl in his spare tire compartment, C.A. Supp. E.R. 153, 165, 214, and that the rear of petitioner's car smelled strongly of soap, id. at 153, "a masking agent" that narcotics traffickers sometimes use "to try and defeat the dogs at the ports of entry," id. at 160. The government also introduced

evidence of petitioner's border-crossing history, id. at 176-177, 182, and his coded Facebook Messenger exchange with "Alberto," id. at 182-184, 199, 205, 209. In addition, the government elicited testimony that, while petitioner had regularly supplemented his income through work as an Uber and Lyft driver in the spring and early summer of 2017, he had almost entirely stopped that work by the time of his arrest in September 2017. Id. at 261-263, 265.

Petitioner testified in his own defense. He did not contest that, at the San Ysidro port of entry, CBP officers discovered 35 pounds of fentanyl hidden in the spare-tire compartment of his Toyota Prius. C.A. Supp. E.R. 309-317. Instead, he claimed that he knew nothing about the drugs; that before his attempted crossing, he had not looked in the Prius's trunk in "a week"; and that someone else must have placed the drugs in his car, possibly when he used a valet parking service at a restaurant in Tijuana, Mexico the day before his arrest. Id. at 256; see id. at 255-257. On cross-examination, petitioner admitted that his car had only one key and that the valet at the Tijuana restaurant was the only person other than petitioner who had access to the car during the relevant period. C.A. E.R. 69. Petitioner further acknowledged that he did not know the valet, and that the valet "would have had no idea when, if ever, [petitioner] would have crossed into the United States." Ibid. (capitalization omitted). And petitioner admitted that he had given law-enforcement officers conflicting

information regarding his destination on the day of his arrest. Id. at 70.

Petitioner never proposed any jury instructions with respect to evidence admitted under Rule 404(b), but petitioner agreed to the set of jury instructions proposed by the government, C.A. Supp. E.R. 232, which included an "other acts" instruction informing the jury that it should consider "evidence that the defendant committed other acts not charged," -- including the evidence of petitioner's prior border crossings -- "only for its bearing, if any, on the question of the defendant's intent, plan knowledge, absence of mistake, and the elements of his offense and for no other purpose." D. Ct. Doc. 40, at 14 (Aug. 13, 2018).

The district court, however, left the "other acts" instruction out of the final set of jury instructions. C.A. Supp. E.R. 284. Neither party requested that omission. See ibid. Rather, shortly before giving the jury its final instructions, the district court granted the government's request to argue that petitioner's prior border crossings suggested he had been part of a trafficking scheme, id. at 283-284, and then announced sua sponte that it was "pulling" the "other acts" instruction, id. at 284. Neither petitioner nor the government offered any response to that announcement. See ibid.

While the final jury instructions did not include the government's proposed "other acts" instruction, they did include instructions regarding the elements of the offense, to which

petitioner raised no objection. See C.A. Supp. E.R. 231, 282. With respect to mens rea, the court instructed the jury that "the government must prove" that "the defendant knew the substance he was bringing into the United States was fentanyl or some other federally controlled substance," but that "it does not matter whether the defendant knew that the substance was fentanyl" and that "[i]t is sufficient that the defendant knew that it was some kind of federally controlled substance." Id. at 292-293. The court further instructed the jury that, to establish petitioner's guilt, "[t]he government is not required to prove the amount or quantity of fentanyl" and "need only prove beyond a reasonable doubt that there was a measurable or detectable amount of fentanyl." Id. at 293. With respect to drug type and quantity, which are relevant to enhanced minimum and maximum penalties under 21 U.S.C. 960(b), the court and verdict form instructed the jury that, "if the jury finds the defendant is guilty of importation of fentanyl," it must then determine whether it "unanimously find[s] that the government has proven beyond a reasonable doubt that the weight of the fentanyl involved in the offenses exceeded 400 grams." C.A. Supp. E.R. 298. Petitioner disclaimed any objection to the jury instructions or the verdict form. Id. at 231-232, 281-283.

The jury found petitioner guilty. C.A. Supp. E.R. 327. It also found beyond a reasonable doubt that petitioner's offense involved 400 or more grams of fentanyl, which triggered a statutory

minimum sentence of ten years under 21 U.S.C. 960(b)(1)(F). Ibid. The district court sentenced petitioner to 120 months of imprisonment, to be followed by five years of supervised release. C.A. E.R. 47-51; Judgment 2-3.

3. On appeal, petitioner argued that the district court erred in omitting an instruction limiting the inferences that the jury could draw from the evidence regarding petitioner's prior border crossings, his coded Facebook Messenger exchange, and his history as an Uber and Lyft driver. Pet. C.A. Br. 7, 13-15. Petitioner asserted this error was not harmless because the district court commented that "it was a remarkable trial, and it probably could have gone either way," id. at 21 (quoting C.A. E.R. 48-49), a statement the court made in applying the sentencing factors to petitioner's case at a sentencing hearing four-and-a-half months after the trial, see C.A. E.R. 48-49.

Petitioner also argued that the district court improperly instructed the jury that it could find petitioner guilty even if he knew only that he was importing an illegal drug, and not that the drug was fentanyl. Pet. C.A. Br. 24-25. Petitioner did not contend that the statute itself required proof of petitioner's knowledge that fentanyl was involved; to the contrary, he acknowledged that, under the statute, "the government can prove that a defendant 'knew he possessed a substance listed on the schedules, even if he did not know which substance it was.'" Id. at 27 (quoting McFadden v. United States, 576 U.S. 186, 192

(2015))). Instead, petitioner asserted that the instructions amounted to an unconstitutional "constructive amendment" of his indictment, which had specifically identified fentanyl as the controlled substance involved in his offense. Id. at 26-28. Petitioner acknowledged, however, that he had not objected to the relevant jury instructions in the district court, such that review was for plain error. Id. at 24

The court of appeals affirmed in an unpublished decision. Pet. App. 1-5. It observed that the parties "largely agree[d] that the district court erred by failing to give an 'other acts' limiting instruction for certain evidence" regarding the prior border-crossings, the Facebook Messenger exchange, and petitioner's history with Uber and Lyft. Id. at 1; see id. at 1-2. It also observed that the government had agreed at oral argument that the alleged error was preserved. Id. at 2. But the court determined that "the absence of such a limiting instruction was harmless under any standard." Ibid.

The court of appeals first rejected petitioner's attempt to rely on the district court's comment that the trial "could have gone either way," observing that the district court's statement was "not clearly a commentary on the strength of the evidence or any piece of evidence," and that it was made "over four months after the trial had concluded." Pet. App. 2. The court further explained that its "independent review of the record confirm[ed] that extensive evidence supported [petitioner's] conviction."

Ibid. That evidence "included that over 30 pounds of highly toxic fentanyl valued at $4.5 million was found in [petitioner's] vehicle; the odor of a drug-masking agent emanating from his car; [petitioner's] inconsistent statements to law enforcement; and the implausibility of [petitioner's] theory that someone would have placed $4.5 million of a highly toxic drug in his vehicle while valeted at a Tijuana restaurant, without knowing when [petitioner] would cross the border." Ibid. In addition, the court found that, "[a]ny potential prejudice from the lack of an 'other acts' limiting instruction" was "substantially mitigated" by the instructions informing the jury that it was "only to determine whether the defendant is guilty or not guilty of the charge in the indictment" and that petitioner was "not on trial for any conduct or offense not charged in the indictment." Id. at 2-3.

The court of appeals also rejected petitioner's assertion that the jury instructions had "constructively amend[ed]" the indictment, observing that "the jury instructions matched the elements of the offense" because "'the government is not required to prove that the defendant knew the type or quantity of the controlled substance he imported to obtain a conviction under 21 U.S.C. 952 and 960.'" Pet. App. 3-4 (citation omitted). The Court further determined that "any objection based on Rehaif v. United States, 139 S. Ct. 2191 (2019), was waived, as [petitioner] failed to raise it" in the brief he filed "several months after Rehaif was decided," and in any event would "not support reversal

because, unlike the statute there, 'the mens rea standard in [Section] 960(a) is separate and distinct from the penalty ranges set forth in [Section] 960(b),' and so does not apply to drug type and quantity." Pet. App. 4 (brackets and citation omitted).

ARGUMENT

Petitioner contends (Pet. 7-18) that the court of appeals erred in determining that the district court's omission of the "other acts" instruction was harmless error. The court of appeals' unpublished opinion appropriately analyzed the record and determined that the omission of the instruction was harmless, and its fact-bound decision does not conflict with the precedent of any other court of appeals. Petitioner also contends (Pet. 18-36) that 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 would be subject to no more than plain error review and is foreclosed by this Court's precedent in McFadden v. United States, 570 U.S. 186 (2015), as petitioner himself acknowledged below, C.A. Br. 27. In any event, the court of appeals' decision on the question is correct, and it does not conflict with the precedent of any other court of appeals. This Court has recently and repeatedly denied review of petitions raising similar questions with respect to both harmless error

analysis[1] and the mens rea requirement under 21 U.S.C. 960,[2] and it should follow the same course here.

1. Petitioner first contends (Pet. 7-18) that the court of appeals erred in determining that the omission of an "other acts" jury instruction was harmless, and that review is warranted because the court of appeals' harmless error analysis conflicts with this Court's precedents and implicates confusion in the courts of appeals. Those contentions lack merit.

a. Under Rule 52(a) of the Federal Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see 28 U.S.C. 2111. Harmless-error doctrine "focus[es] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Delaware

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[1] See, e.g., Leaks v. United States, 576 U.S. 1022 (2015) (14-1077); Runyon v. United States, 574 U.S. 813 (2014) (No. 13-254); Gomez v. United States, 571 U.S. 1096 (2013) (No. 13-5625); Demmitt v. United States, 571 U.S. 952 (2013) (No. 12-10116); Ford v. United States, 569 U.S. 103 (2013) (No. 12-7958); Acosta-Ruiz v. United States, 569 U.S. 1031 (2013) (No. 12-6908). A petition for a writ of certiorari regarding the appropriate application of the constitutional harmless error standard is currently pending before the Court in Pon v. United States, No. 20-1709 (filed May 10, 2021).

[2] See, e.g., Cole v. United States, 2021 WL 2519326 (2021) (No. 20-7253); Salazar-Martinez v. United States, 140 S. Ct. 2517 (2020) (No. 19-6282); Garcia v. United States, 140 S. Ct. 1104 (2020) (No. 18-9699); 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).

v. Van Arsdall, 475 U.S. 673, 681 (1986). Outside the narrow category of structural errors, see Neder v. United States, 527 U.S. 1, 7-8 (1999), the court of appeals must conduct an "analysis of the district court record * * * to determine whether the error was prejudicial," i.e. "whether it "affected the outcome of the district court proceedings." United States v. Olano, 507 U.S. 725, 734 (1993). The requirement of prejudice ensures that the "substantial social costs" that result from reversal of criminal verdicts will not be imposed without justification. United States v. Mechanik, 475 U.S. 66, 72 (1986).

The test is an objective one, asking whether "a rational jury would have found the defendant guilty absent the error." Neder, 527 U.S. at 18. It requires "weigh[ing] the probative force of th[e] evidence" to determine whether an error was sufficiently "unimportant in relation to everything else" that its absence would not have altered the verdict. Yates v. Evatt, 500 U.S. 391, 403-404 (1991); see United States v. Lane, 474 U.S. 438, 448 n.11 (1986). Where the error at issue is of constitutional dimension, the reviewing court may find it harmless only if the government demonstrates "beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error]." Yates, 500 U.S. at 405 (applying Chapman v. California, 386 U.S. 18 (1967)). But where, as here, the error is nonconstitutional, it is evaluated under the less demanding standard articulated in Kotteakos v. United States, 328 U.S. 750

(1946), and is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict," id. at 776; see Brecht v. Abrahamson, 507 U.S. 619, 631-632 & n.7, 637-638 (1993) (explaining that "claims of nonconstitutional error" are judged under the Kotteakos standard).

b. The court of appeals correctly applied the harmless error standard in evaluating whether the non-constitutional error in this case was harmless. At trial, petitioner disputed only one element of his drug-importation charge: his knowledge that his car contained fentanyl (or another controlled substance) when he attempted to enter the United States at the San Ysidro port of entry. See pp. 5-6, supra. Based on its "independent review of the record," the court of appeals determined that, "under any standard," Pet. App. 2, the erroneously omitted "other acts" limiting instruction would not have had the requisite "substantial and injurious," Kotteakos, 328 U.S. at 776, effect on the jury's verdict, Pet. App. 2.

As the court of appeals explained, two considerations established the error's harmlessness. First, "extensive evidence" supported the jury's finding that petitioner knew of the drugs concealed in his car. Pet. App. 2. As the court observed, "over 30 pounds of highly toxic fentanyl valued at $4.5 million w[ere] found in [his] vehicle"; a noticeable "odor of a drug-masking agent [was] emanating from [the] car"; petitioner had made "inconsistent statements to law enforcement"; and petitioner's own "theory" --

that "someone would have placed $4.5 million of a highly toxic drug in his vehicle while valeted at a Tijuana restaurant, without knowing when [petitioner] would cross the border" -- was "implausib[le]." Pet. App. 2. Second, the district court's general jury instructions provided safeguards against any improper inference based on petitioner's uncharged acts. Pet. App. 2-3. Those instructions, which the jury is presumed to have followed, "substantially mitigated" "[a]ny potential prejudice" from the district court's omission of a specific "other acts" limiting instruction. Ibid.; see Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions.").

Petitioner contends (Pet. 14-15) that the court of appeals' harmless error analysis was flawed because it is not "permissible to weigh and reject a defendant's credibility as part of appellate harmless error review." That contention is foreclosed by Brecht, in which this Court considered whether a State's improper use of a defendant's post-Miranda silence in a murder trial was harmless error under the Kotteakos standard. 507 U.S. at 638-639. In Brecht, as in this case, the defendant had taken the stand to offer an exculpatory account of his conduct. Id. at 624 (explaining that Brecht testified that he had shot the victim by accident). This Court nonetheless found that the error was harmless in part because the State had introduced "weighty" evidence that was "inconsistent with petitioner's testimony." Id. at 639. Brecht

therefore demonstrates that a reviewing court may find harmless error notwithstanding a defendant's self-serving testimony.

Petitioner's remaining quarrels with the court of appeals' analysis amount to a request for fact-bound error correction. He suggests, for example, that the court of appeals erred in discounting the district court's statement that the trial was "remarkable" and "could have gone either way." Pet. 16 (citation omitted). But, as the court of appeals explained, that statement "was not clearly a commentary on the strength of the evidence," and it was made "over four months after the trial had concluded." Ibid. Moreover, the district court was speaking at a sentencing hearing, see C.A. E.R. 48-49, in a context entirely divorced from the question of whether a particular error might have been harmless and without the benefit of any briefing on that question from the parties. The court of appeals did not err in relying on its "independent review of the record" rather than such an off-the-cuff statement by the district court.

Petitioner also asserts (Pet. 16-17) that the court of appeals should not have placed weight on the instructions informing the jury that it should consider only whether petitioner was guilty of the charged crime, and that the court should have placed more weight on the way the government used the other-acts evidence at trial. Neither assertion establishes that the court erred in finding that the omission of the "other acts" instruction was

harmless on the facts of this case, let alone the sort of significant legal error that might warrant this Court's review.

c. Petitioner contends that review is necessary to address "confusion" and "conflict" in the courts of appeals. Pet. 7 (emphasis omitted). That contention lacks merit.

The main "conflict" that petitioner alleges(Pet. 8-14) is over whether courts may appropriately consider the plausibility of a defendant's testimony in conducting a harmless error analysis. But Brecht demonstrates that a defendant's self-serving disclaimer is not dispositive. See pp. 15-16, supra. The sole decision that petitioner cites to establish that the courts of appeals are nonetheless in conflict is a 1999 case in which the Sixth Circuit granted habeas relief on the view that a state court's constitutional harmless error analysis was flawed because it involved "weighing competing evidence and deciding that some evidence is more believable than others." Barker v. Yukins, 199 F.3d 867, cert. denied, 530 U.S. 1229 (2000). This case involves different facts and a nonconstitutional harmless error analysis. And petitioner has not cited any more recent Sixth Circuit decisions that might suggest a conflict. The remaining citations on which petitioner relies (Pet. 10-13) are either dissenting opinions or decisions from the same circuit from which this case arises. Under this Court's ordinary practice, however, neither dissenting opinions nor any purported intra-circuit conflict (Pet.

13) would warrant this Court's review. See Sup. Ct. R. 10; Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner also briefly suggests (Pet. 7-8) that this Court should grant review because the circuits are confused as to what standard should guide the harmless error analysis. But this case does not implicate the appropriate standard for a harmless error analysis because the court of appeals stated that the omission of the "other acts" instruction was "harmless under any standard." Pet. App. 2.

2. Petitioner separately contends (Pet. 18-36) that 21 U.S.C. 960 requires proof beyond a reasonable doubt that he knew the specific drug type and quantity involved in his offenses. That contention, which is subject, at most, to review for plain error, see pp. 25-26, infra, is foreclosed by McFadden.

a. In McFadden, this Court considered the scope of the knowledge requirement in 21 U.S.C. 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. 576 U.S. 189-191. 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)(1). Section 841(b) then 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. 21 U.S.C. 841(b).

McFadden 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." 576 U.S. at 192. The Court 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."' Id. at 191-192. 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. Id. at 192 (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 forecloses petitioner's claim that his conviction required knowledge of "drug type and quantity." Pet. 18 (emphasis omitted). Although petitioner was convicted under Section 960 rather than Section 841, his own petition adopts the premise that Section 841 and Section 960 impose the same mens rea requirement. See, e.g., Pet. 18-21 (citing the two provisions in tandem); see also Pet. C.A. Br. 26 ("Section 960 is 'structurally identical' to 21 U.S.C. § 841"). 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), providing 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). 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 explanation 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," 576 U.S. at 192, 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). Although both sections

together define the relevant violation of the criminal statutes, c.f. Pet. 26 n.6, to be subject to the statutory minimum and maximum penalties set forth in Section 960(b), a defendant need "know only that the substance he is dealing with is" an illegal drug. Ibid. (citation omitted).

b. In the court of appeals, petitioner himself acknowledged that, under McFadden, "the government can prove that a defendant 'knew he possessed a substance listed on the schedules, even if he did not know which substance it was.'" Pet. C.A. Br. 27 (quoting McFadden, 576 U.S. at 192)). In now contending otherwise, petitioner principally relies on a trio of cases that were decided before McFadden and do not call the applicability of that decision into question. Pet. 21-36 & n.5 (citing Flores-Figueroa, v. United States, 566 U.S. 646 (2009), 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. McFadden, 576 U.S. at 191-192. And X-Citement Video was decided more than 20 years before McFadden and addressed a distinct federal statute governing child pornography. See X-Citement Video, 13 U.S. at 65.

Petitioner's reliance (Pet. 20, 33) 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. Collazo, 984 F.3d 1308, 1322 (9th Cir. 2021) (en banc); 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)).

Petitioner is also mistaken in his assertion (Pet. 24-25) that the Court's recent decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), supports his argument. As a threshold matter, the court of appeals determined that petitioner "waived" any argument based on Rehaif by failing to raise it below. Pet. App. 4 (noting that petitioner's "reply brief was filed several months after Rehaif was decided"). Furthermore, petitioner's reliance on Rehaif lacks merit. 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, as the Ninth Circuit recently explained, Rehaif involved "a statute structured much differently," United States v. Cole, 843 Fed. Appx. 886, 889, cert. denied, 141 S. Ct. 2824 (2021), 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). Rehaif, 139 S. Ct. at 2195-2196.

No similar structure exists here. As explained above, see p. 20, 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). See Collazo, 984 F.3d at 1326 (distinguishing Rehaif, in construing the mens rea requirement of 21 U.S.C. 841, based on the same structural difference). Moreover, to the extent that Rehaif's reasoning was informed by the need to "separate wrongful from innocent acts," 139 S. Ct. 2197, knowingly smuggling a controlled substance into the United States is not "innocent conduct," id. at 2211, even when the defendant does not know "precisely what substance it is," McFadden, 576 U.S. at 192; see Collazo, 984 F.3d at 1327 ("Knowingly distributing a controlled substance in violation of § 841(a)(1) is not an 'entirely innocent' act.") (citation omitted); Cole, 843 Fed. Appx. at 889 (similar).

c. Petitioner does not identify any division in the circuits on the mens rea requirement for Section 960. He instead

cites two dissenting opinions regarding the mens rea requirement in Section 841. See Pet. 22-23, 32-34 (citing Collazo, 984 F.3d at 1337-1343 (Fletcher, J., dissenting); Dado, 759 F.3d at 571-573 (Merritt, J., dissenting)). 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). McFadden then expressly referenced the uniform position of the circuits with approval. 576 U.S. at 192 (citing cases). The one post-McFadden decision petitioner cites that involved the federal drug statutes -- the Ninth Circuit's recent en banc decision in United States v. Collazo, supra -- "reiterated" the consensus position. Cole, 843 Fed. Appx. at 889; see Collazo, 984 F.3d at 1329 n.21 (citing cases from other circuits).

Finally, petitioner repeatedly cites (Pet. 20, 23, 27-29, 31, 32, 34-35) then-Judge Kavanaugh's dissenting opinion in United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012) (en banc), cert. denied, 568 U.S. 1196 (2013). But Burwell, which was decided nearly three years before this Court's decision in McFadden, did not involve Section 960, Section 841, or any other federal drug statute. It presented, instead, the distinct question whether 18 U.S.C. 924(c)(1)(B)(ii), which imposes a mandatory thirty-year sentence for carrying a machinegun while committing a crime of violence, "requires the government to prove that the defendant

knew the weapon he was carrying was capable of firing automatically." Burwell, 690 F.3d at 502. And the Burwell dissent expressly reserved judgment on "how the presumption [of mens rea] applies to a fact that," like drug type and quantity under Sections 841 and 960, "Congress made a sentencing factor but that must be treated as an element of the offense for Fifth and Sixth Amendment purposes." Id. at 540 n.13 (Kavanaugh, J., dissenting)(observing that the question was "not presented" in Burwell).

d. In any event, even if the knowledge element of Section 960 otherwise warranted this Court's consideration, this case would not be a suitable vehicle to consider that issue because petitioner's claim would be reviewable only for plain error. In the district court, petitioner affirmatively disclaimed any objection to the jury instructions and the verdict form. C.A. Supp. E.R. 231-232, 281-283. Nor did petitioner raise his statutory claim in the court of appeals. He advanced, instead, a constructive amendment claim -- namely, that the district court's mens rea instruction was too broad because "[t]he indictment only charged" that [petitioner] knowingly imported fentanyl." Pet. C.A. Br. 27. Indeed, petitioner expressly acknowledged that "the government can prove that a defendant 'knew he possessed a substance listed on the schedules, even if he did not know which substance it was.'" Ibid. (quoting McFadden, 576 U.S. at 192)).

Petitioner has thus at least forfeited the statutory claim he presses for the first time in this Court. See, e.g., United States

v. Ortiz, 422 U.S. 891, 898 (1975). Accordingly, he would be entitled to relief only if he could show (1) an error, (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted). Petitioner cannot satisfy these demanding requirements because the district court's determination that petitioner's conviction under Section 960 does not require proof of knowledge of the specific drug type is consistent with the decisions of every court of appeals to consider the issue and with this Court's decision in McFadden. See pp. 23-24, supra. Moreover, the jury obviously rejected petitioner's self-serving claim that he had no knowledge of the drugs that he was trafficking.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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