

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

VICENTE LOPEZ-SANCHEZ
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 21-60082

PETITION FOR WRIT OF CERTIORARI

Omodare B. Jupiter (MB #102054)
Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Michael L. Scott (MS Bar #101320)
Assistant Federal Public Defender

Attorney for Defendant-Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the district court erred by denying the defense's jury instruction stating that for a finding of guilt, Mr. Lopez had to know that the person assaulted was a law enforcement officer acting within the course of his job duties.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

This case involves a trial in which the jury found Mr. Lopez guilty of assaulting a law enforcement officer in violation of 18 U.S.C. § 111. The two-day trial began on October 21, 2019. After that, the district court sentenced Mr. Lopez to serve 180 months in prison, followed by three years' supervised release. It entered a Judgment reflecting this sentence on February 5, 2021. The Judgment is attached hereto as Appendix 1. The district court case number is 3:18cr164-HTW-FKB.

The district court denied Mr. Lopez's request for a jury instruction stating that a finding of guilt required Mr. Lopez to know that the person assaulted was a law enforcement officer acting within the course of his job duties. On February 5, 2021, Mr. Lopez appealed this ruling to the United States Court of Appeals for the Fifth Circuit.¹ The Fifth Circuit affirmed the district court's ruling via an Opinion and Order filed November 3, 2021. It filed a Judgment on the same day. The Opinion and Order and the Judgment are attached hereto as composite Appendix 2. The Fifth Circuit case number is 21-60082.

¹ Mr. Lopez also appealed the unreasonably high above-Guidelines sentence ordered by the district court. That issue, however, is not raised in this Petition for Writ of Certiorari.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Opinion and Order and its Judgment affirming the district court's ruling on November 3, 2021. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Order, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. STATUTE INVOLVED

This case involves an alleged violation of 18 U.S.C. § 111, which states:

(a) In general.--Whoever--

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty.--Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Extraterritorial jurisdiction.--There is extraterritorial jurisdiction over the conduct prohibited by this section.

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered in the United States District Court for the Southern District of Mississippi for violation of 18 U.S.C. § 111. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the underlying criminal charges levied against Mr. Lopez arose from the laws of the United States of America.

B. Statement of material facts.

1. Facts about Mr. Lopez.

Like many of the people who come to the United States from south of the border to better themselves, Mr. Lopez is a Mexican national of Hispanic ethnicity. He has 12 siblings. He quit school at age 15 to work in construction, and he moved out on his own at age 16. Mr. Lopez never had the opportunity to achieve a high school diploma or a GED.

Mr. Lopez is now 40 years old. Admittedly, he did not come to the United States legally. But he has worked here productively in the construction industry.

2. Facts about the assault charge.

The alleged assault occurred on the shoulder of Interstate 20 East in Brandon, Mississippi, on August 2, 2018. Brandon police officer Joseph French pulled over the Tahoe driven by Mr. Lopez because he was purportedly following

too close to the driver in front of him. In addition to Mr. Lopez, four passengers were in the Tahoe.

Officer French initially told Mr. Lopez that he would simply write him a warning citation. But he testified in court that he thought the situation might involve an illegal alien smuggling operation, so he radioed for ICE agent Francisco Ayala to come to the traffic stop. After calling Agent Ayala, Officer French put Mr. Lopez in the front passenger seat of his patrol car.

Agent Ayala arrived wearing plain clothing, i.e., he was not in a police uniform. When Agent Ayala walked up to the patrol car, Mr. Lopez asked Officer French if that was his brother or if he was another law enforcement agent.

Agent Ayala spoke with the passengers in the Tahoe, then he walked back to Officer French's patrol car. He informed Mr. Lopez that he was going to detain him. Apparently, Mr. Lopez did not understand why he was being arrested.

Mr. Lopez resisted when Agent Ayala and Officer French attempted to handcuff him. A one-to-two-minute struggle followed. Agent Ayala testified that he broke a bone in his foot during the struggle. Medical records indicate that the injury occurred when he twisted his foot and ankle.

Dispatch called Brandon police officer Reese Robbins to the scene. When he arrived, the struggle was still going on. Then, after Agent Ayala was on top of

Mr. Lopez's upper body and Officer French was on top of his lower body, Agent Ayala instructed Officer Robbins to tase Mr. Lopez.

Officer Robbins ignored Agent Ayala's order to tase Mr. Lopez. Instead, he took the more reasonable action of holding the Taser near Mr. Lopez and activating it so that the electric current visibly lit up. He then asked Mr. Lopez if he wanted to be tased. After that, the struggle ended and Mr. Lopez allowed the officer to handcuff him without being tased.

As stated above, the reason for Mr. Lopez's initial detention and arrest was for suspicion of alien smuggling. However, the prosecution never charged him with that offense.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” For the following reasons, this Court should exercise its discretion and grant certiorari in this case.

Mr. Lopez’s argument pertains to one of the defense’s proposed jury instructions. The defense asked the court to instruct the jury that a finding of guilt required the prosecution to prove that Mr. Lopez knew: (1) that Agent Ayala was a law enforcement officer; and (2) that Agent Ayala was acting within the course and scope of his duties during the assault. The district court refused to instruct the jury on these required elements of scienter. This failure was reversible error under either this Court’s holdings in *Rehaif v. United States*, 139 S.Ct. 2191 (2019) or the Fifth Circuit’s own holdings in *United States v. Young*, 464 F.2d 160 (5th Cir. 1972).

Protection of the scienter / knowledge requirement of any specific intent crime is of utmost importance in our criminal justice system. The Fifth Circuit trampled on this requirement through its denial of the requested jury instruction. Granting certiorari on this issue will protect the rights of defendants not only in the Fifth Circuit, but also defendants across the country.

B. The district court erred by denying the defense's jury instruction stating that for a finding of guilt, Mr. Lopez had to know that the person assaulted was a law enforcement officer acting within the course of his job duties.

1. The jury instruction at issue.

Our argument focuses on the district court's failure to grant the defense's jury instruction informing the jury that a guilty verdict required a finding that Mr. Lopez knew that Agent Ayala was a law enforcement officer acting within the course of his duties as a law enforcement officer. Proposed jury instruction D-20 was the defense's requested jury instruction on this issue.

Proposed instruction D-20 states all the elements that a jury must consider before returning a verdict. But the only element of this instruction at issue on appeal is the third element, which states: "*Third: That the defendant knew that the person assaulted was a federal officer as described below, who was then engaged in the performance of his official duties[.]*"

The defense asked the court to submit proposed jury instruction D-20 to the jury, and the court denied the request over the defense's objection. Instead, the court instructed the jury that

it is not necessary to show that the defendant knew the person being forcibly assaulted was at that time a federal officer carrying out an official duty so long as it is established beyond a reasonable doubt that the victim was in fact a federal officer acting in the course of his duty and the defendant intentionally committed a forcible assault upon that officer.

The court went on to state, “[y]ou are instructed that Francisco Ayala is a federal officer and that it is a part of the official duty of such an officer to detain or apprehend persons suspected of violating federal laws.”

The bottom line on the court’s instruction to the jury is this – a finding of guilt did not require the jury to find that Mr. Lopez knew that Agent Ayala was a law enforcement officer at the time of the assault, and it did not require the jury to find that Agent Ayala was acting within the course of his duties as a law enforcement officer at the time of the assault. In fact, the jury was specifically instructed to the contrary. The court instructed the jury that “Francisco Ayala is a federal officer and that it is a part of the official duty of such an officer to detain or apprehend persons suspected of violating federal laws.” For the reasons that follow, this was reversible error.

2. Law and argument.

The defense acknowledges that prior to this Court’s opinion in *Rehaif v. United States*, 139 S.Ct. 2191 (2019), a conviction for assaulting a federal law enforcement officer generally did not require the defendant to know that the victim was an officer acting within the scope of his or her official duties.² See *Bennett v. United States*, 285 F.2d 567, 570-71 (5th Cir. 1960) (citations omitted). *Rehaif*,

² As presented below, under the Fifth Circuit’s holdings in *United States v. Young*, 464 F.2d 160 (5th Cir. 1972), this general rule does not apply under the facts of Mr. Lopez’s case.

however, was a game changer regarding a defendant's required knowledge of all elements of a charged crime.

Rehaif involved a conviction under 18 U.S.C. § 922(g)(5)(A) for possession of a firearm by someone illegally in the United States. *Rehaif*, 139 S.Ct. at 2194. A separate provision, § 924(a)(2), adds that anyone who “knowingly violates” § 922(g) shall be fined or imprisoned for up to 10 years. *Id.* The Supreme Court granted certiorari “to consider whether, in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm.” *Id.* at 2195. The *Rehaif* Court ruled, “in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.” *Id.* at 2200.

How the *Rehaif* Court reached its final ruling is as important as the ruling itself. The Court recognized, “[i]n determining Congress’ intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding ‘each of the statutory elements that criminalize otherwise innocent conduct.’” *Rehaif*, 139 S.Ct. at 2195. “Scienter requirements advance this basic principle of criminal law

by helping to ‘separate those who understand the wrongful nature of their act from those who do not.’” *Id.* at 2196 (citation omitted).

“We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question.” *Rehaif*, 139 S.Ct. at 2197 (citation omitted; emphasis added); *see also, id.* at 1295 (holding “[w]e apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text.” (citation omitted)). Further, the Court has “interpreted statutes to include a scienter requirement even where ‘the most grammatical reading of the statute’ does not support one.” *Id.* at 1297 (citation omitted).

The assault statute at issue in Mr. Lopez’s case is 18 U.S.C. § 111(a)(1), which makes it a crime when a person “forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties.” The “any person designated in section 1114 of this title” includes any “officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services)[.]” 18 U.S.C. § 1114.

Combining the provisions of §§ 111 and 1114 indicates that the essential elements of a § 111 violation are:

- first, that an assault occurred;

- second, that the assault was on an officer or employee of the United States;
- and third, that the officer or employee of the United States was acting in the scope of his or her job duties when the assault occurred.

In Mr. Lopez's case, the "officer or employee of the United States" was Agent Ayala, an ICE agent.

The assault element of the § 111 violation is not at issue in Mr. Lopez's argument. At issue are the other two elements – that Agent Ayala was a federal law enforcement officer and that he was acting within the course of his duties as a law enforcement officer.

Under *Rehaif*, a finding of guilt required the prosecution to prove scienter regarding both of the contested elements. *See Rehaif*, 139 S.Ct. at 2195-97. That is, it had to prove that Mr. Lopez knew that Agent Ayala was an ICE agent, and that Agent Ayala was acting within the scope of his job duties. *See id.*

Rather than require these elements of proof, the district court did just the opposite through its jury instructions. As stated above, the court instructed the jury that

it is not necessary to show that the defendant knew the person being forcibly assaulted was at that time a federal officer carrying out an official duty so long as it is established beyond a reasonable doubt that the victim was in fact a federal officer acting in the course of his duty and the defendant intentionally committed a forcible assault upon that officer.

And it went on to state to the jury, “[y]ou are instructed that Francisco Ayala is a federal officer and that it is a part of the official duty of such an officer to detain or apprehend persons suspected of violating federal laws.” The district court’s instructions to the jury completely eviscerated the scienter requirement regarding Mr. Lopez’s knowledge that Agent Ayala was an ICE Agent acting in the course of his job duties when the assault occurred.

Evidence presented at trial created a fact issue on the two contested elements of the crime. As Officer French testified at trial, when Agent Ayala walked up to the patrol car, Mr. Lopez asked Officer French if that was his brother, or if he was another law enforcement agent. This is evidence of confusion in Mr. Lopez’s mind as to whether Agent Ayala was a law enforcement officer acting within the course of his job duties.

In summary, *Rehaif* requires the prosecution to prove scienter regarding all elements of the assault charge against Mr. Lopez. The district court’s jury instructions to the contrary did away with this requirement. This Court should grant certiorari to correct the lower courts’ error.

But even if this Court finds that the scienter requirement does not generally apply to the two contested elements of the assault charge, scienter was required under the specific facts of this case. That is true under the Fifth Circuit’s holdings in *United States v. Young*, 464 F.2d 160 (5th Cir. 1972).

The defendant in *Young* was driving his car on Monument Street in Jackson, Mississippi. *Young*, 464 F.2d at 161. Law enforcement officers that intended to arrest Mr. Young followed behind him in an unmarked car. *Id.* at 161 and 162 n.2. The officers' car pulled in front of Young's car, then forced it to slow down to a stop or near stop. *Id.* at 161-62. When one of the officers got out of the car, Mr. Young attempted to drive away, but he ran into the officers' car instead. *Id.* at 162. The officer outside of the car had to jump out of the way to avoid being hit. *Id.*

Based on the above events, the prosecution charged Mr. Young with assault under 18 U.S.C. § 111, the same statute that Mr. Lopez was charged under. *Young*, 464 F.2d at 161. At trial, the court instructed the jury that “[i]t is completely unimportant whether this defendant did or did not know that these men were FBI agents on such occasion.” *Id.* at 162. The jury returned a guilty verdict. *Id.* at 161.

The issue on appeal was whether “knowledge of the official capacity of the person assaulted is unnecessary for a conviction under 18 U.S.C. § 111.” *Young*, 464 F.2d at 163. Arguing that such knowledge was required under the facts of his case, Mr. Young stated, “he did not realize that the men who attempted to impede his progress on Monument Street were law enforcement officers trying to arrest him.” *Young*, 464 F.2d at 162. He further argued that trying to drive away was

“simply a non-violent attempt to prevent two strange white men from stopping his path of travel.” *Id.*

The Fifth Circuit agreed with Mr. Young, and reversed his conviction. *Young*, 464 F.2d at 164. The court began by recognizing that prior Fifth Circuit precedent regarding § 111 did not require an assailant to know that the victim was an official or employee of the United States. *Id.* at 163 (citations omitted). But the court went on to recognize that none of the prior cases “holds that a defendant may be held absolutely liable for ‘assaulting’ a government officer when the defendant acts from the mistaken belief that he himself is threatened with an intentional tort by a private citizen.” *Id.*

The *Young* court concluded that

if the defendant asserts a lack of intention or willfulness based upon ignorance of the identity of the victim and ignorance of the victim’s official privilege to interfere with the defendant’s person or freedom of movement, the jury must be allowed to consider the defendant’s evidence tending to show that he was ignorant of the official capacity of the victim. For only then can the jury give fair consideration to whether the ‘assault’ was ‘an intentional act willfully done without legal excuse.’”

Young, 464 F.2d at 163 (citation omitted). In other words, “[a] case based upon Section 111, as construed by this court, is not submitted to the jury without a charge that the ‘assault’ must be an intentional act willfully done without legal excuse.” *Id.* (citation omitted).

As in *Young*, Mr. Lopez presented evidence at trial that he was unaware of Agent Ayala's capacity as an ICE agent. That is true based on his question to Officer French regarding whether Agent Ayala was his (Officer French's) brother, or whether he was ICE agent. This was a reasonable question since Agent Ayala was wearing street clothes. As in *Young*, Mr. Lopez took measures to protect himself when Agent Ayala tried to restrain him.

Under these facts, *Young* required the district court to instruct the jury on scienter regarding Mr. Lopez's knowledge that Agent Ayala was a federal officer acting within the scope of his duties. Because the district court refused to do so, this Court should grant certiorari, and then vacate the Judgment of Conviction and remand the case to district court for retrial.

VI. CONCLUSION

For all the reasons stated above, Mr. Lopez asks the Court to grant his Petition for Writ of Certiorari.

Submitted January 27, 2022, by:



Michael L. Scott

Assistant Federal Public Defender
Office of the Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner

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CERTIFICATE OF SERVICE

I, Michael L. Scott, appointed under the Criminal Justice Act, certify that today, January 27, 2022, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 775885943532, addressed to:

The Honorable Elizabeth Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.



Michael L. Scott
Assistant Federal Public Defender