No. 12-6908

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL ARTURO ACOSTA-RUIZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

MYTHILI RAMAN
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in its harmless-error analysis by focusing solely on the weight of the properly admitted evidence without considering the potential effect of the error on the jury.

IN THE SUPREME COURT OF THE UNITED STATES

No. 12-6908

SAMUEL ARTURO ACOSTA-RUIZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not published in the Federal Reporter but is reprinted in 481 Fed. Appx. 213.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2012. The petition for a writ of certiorari was filed on October 22, 2012 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of unlawfully transporting an illegal alien, in violation of 8 U.S.C. 1324(a)(1)(A)(ii), and one count of conspiracy, in violation of 8 U.S.C. 1324(a)(1)(A)(v)(I). The district court sentenced petitioner to 16 months of imprisonment to be followed by three years of supervised release. Four days later, petitioner completed his sentence of imprisonment and was removed to Mexico. On the same day, petitioner's counsel noticed an appeal. The court of appeals affirmed. Pet. App. A1-A9.

1. In February 2010, petitioner joined a group of individuals in Mexico who sought to enter the United States illegally with the services of an alien smuggler. After crossing the border, the guide lost his way and led the group in circles for about four days. The group had access to some rain water on the journey but ran short on food. Pet. App. A2; Trial Tr. (Tr.) 209, 212.

On the morning of February 13, 2010, petitioner and four other aliens decided to set out on their own. Three hours later, the five-member group found an abandoned trailer in which they discovered water and a map from which they determined that they were near the border town of Carrizo Springs, Texas. Petitioner then called his common-law wife in Dallas on his cell phone. Petitioner asked her to pick him up, and she agreed. Pet. App. A2. Dallas is about

400 miles northeast of Carrizo Springs. A direct driving route from Carrizo Springs to Dallas would pass through San Antonio (about 115 miles from Carrizo Springs) and Austin (about 80 miles beyond San Antonio). Cf. Tr. 274.

Petitioner allowed the other aliens to use his phone, but they were unable to get anyone to pick them up. Thereafter, during the six hours that it took petitioner's wife to drive from Dallas to Carrizo Springs, the four aliens repeatedly asked and pressured petitioner to bring them with him. Pet. App. A2.

Once petitioner's wife arrived, petitioner agreed to transport the four other aliens to Austin, Texas. All five aliens entered the vehicle, and petitioner's wife drove away. About 20 minutes later, Crystal City, Texas police officers stopped the vehicle and took the group into custody. Although petitioner indicated at trial that he agreed to transport the others to Austin because he was concerned that they were in poor physical condition, petitioner admitted that he never considered taking them to a hospital, getting food for them, or calling the police. Pet. App. A2-A3. Petitioner testified at trial that he "knew [the four] were illegal aliens" and that he agreed to take them to Austin "because [the four] were going to a place near Austin." Tr. 223-224.

2. A federal grand jury indicted petitioner and petitioner's wife. Two of the four aliens whom petitioner had agreed to bring to Austin were removed to Mexico; the other two -- Juan Lopez-

Garcia (Lopez) and Jose Mendez-Parra (Mendez) -- were detained as material witnesses and deposed pursuant to 18 U.S.C. 3144. Pet. App. A3. Petitioner's attorney cross-examined both men at their videotaped depositions. Lopez Dep. 27-38, 50-51; Mendez Dep. 19-24, 30, 32.

During the depositions, government counsel informed Lopez and Mendez that they might be needed to testify at trial and, if they were so needed, the government would grant them permission to reenter the United States and pay their travel expenses. Government counsel also asked the witnesses to provide, and both provided, an address and telephone number where each could be reached in Mexico. Government counsel gave the witnesses letters written in English and Spanish, which included the name and telephone number of a Border Patrol agent who would help them reenter the United States for trial. Pet. App. A3-A4; Lopez Dep. 22-25; Mendez Dep. 17-18, 33. On April 15, 2010, Lopez and Mendez were deported to Mexico. Pet. App. A4.

On November 15, 2010, two weeks before trial, the government moved the district court to declare Lopez and Mendez unavailable so that their videotaped depositions could be admitted at trial. Dist. Ct. Doc. 69; see Fed. R. Evid. 804(a)(5). Government counsel represented that the government had, inter alia, (1) attempted unsuccessfully to contact Lopez and Mendez by telephone on 12 separate occasions; (2) mailed subpoenas to the witnesses' Mexican

addresses with letters stating that the government would pay their travel expenses; (3) contacted the witnesses' counsel, who stated that he had no further contact with the witnesses after their removal; and (4) conducted a records check, which showed that the witnesses had no post-removal contact with law-enforcement authorities. Government counsel explained that the witnesses were not served with subpoenas during the April 2010 depositions because, at the time, no trial date had been set. Pet. App. A4; Dist. Ct. Doc. 69, at 3-4; Tr. 27, 81.

Neither petitioner nor his wife disputed the government's factual assertions or argued that the government needed to submit evidence proving those (uncontested) facts. Petitioner instead objected to the motion on the ground that the government had not shown that either witness had actually been tendered a subpoena because, although the government had mailed a subpoena to each witness with return-receipt requested, the government never received either return receipt. Tr. 28-31. Petitioner's wife argued that the government was insufficiently diligent because it should have sought assistance from Mexican authorities, Tr. 27-28, and had not shown whether federal agents had asked for alternative phone numbers when they called the numbers provided by witnesses, Tr. 85. The government offered to present a federal agent to testify and "fill in the facts of what happened on each phone call," Tr. 86, but the district court declined the offer because it was "satisfied

factually" that the 12 calls to the phone numbers provided by the witnesses were sufficient. Ibid. After restating the (uncontested) facts illustrating the efforts to locate the witnesses, the district court concluded that those efforts were reasonable and reflected due diligence and a good-faith attempt to secure the witnesses for trial. Tr. 83-84. The court accordingly declared the witnesses unavailable. Tr. 84.

The government's evidence at trial included the videotaped depositions. Petitioner testified in his own defense. The jury found petitioner guilty on all counts. Pet. App. A4-A5. On May 9, 2011, the district court sentenced petitioner to 16 months of imprisonment with credit for petitioner's pretrial detention. Judgment 2.[1]

3. Petitioner appealed, arguing, as relevant here, that his confrontation rights were violated by admitting the depositions into evidence. More specifically, petitioner argued that the district court erred in declaring the witnesses unavailable for trial because the court incorrectly relied on government counsel's representations and, alternatively, the government's facts did not show

---

[1] The U.S. Marshals Service has informed this Office that on May 13, 2011, petitioner completed his term of imprisonment and was released into immigration custody. The Department of Homeland Security has informed this Office that, later that day, the agency removed petitioner to Mexico. Because of the presumption of collateral consequences from a criminal conviction, however, petitioner's challenge to his conviction is not moot. Sibron v. New York, 392 U.S. 40, 55-56 (1968).

good-faith efforts to locate the witnesses. Pet. App. A7.

The court of appeals declined to decide the merits, holding instead in an unpublished decision (Pet. App. A1-A9) that any error was harmless beyond a reasonable doubt. Id. at A8-A9. The court explained that a constitutional error is harmless if the reviewing court, "after a thorough examination of the record[,] is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Id. at A7 (quoting United States v. Barraza, 655 F.3d 375, 382 (5th Cir. 2011), cert. denied, 132 S. Ct. 1590 (2012)). The court "conclude[d], beyond a reasonable doubt, that absent the playing of Lopez's and Mendez's videotaped deposition testimony during trial, the jury would have nonetheless found [petitioner] guilty." Id. at A8.

The court of appeals explained that the only contested issue at trial was whether petitioner transported the aliens "in furtherance of their unlawful presence in the United States" and that petitioner's defense was that he agreed to transport them to Austin only because they "were in dire straits." Pet. App. A8 (emphasis omitted). The court explained, however, that testimony from Border Patrol agents undermined that contention and that petitioner's own testimony about the reasons he agreed to transport the aliens to Austin was ambiguous and suggested that petitioner felt he "'could not just leave them' because of their slim chance of escaping the brush undetected" by authorities. Id. at A8-A9. "[W]hen [peti-

tioner's] testimony is coupled with the facts elicited by the Government" about petitioner's actions once the group entered his wife's car and the fact that "the destination for dropping off the others was Austin (over three hours away) and not a hospital," the court reasoned, "the only conclusion that could be drawn was that [petitioner's] transportation was with the intent to further their unlawful presence." Id. at A9.

ARGUMENT

Petitioner contends that the court of appeals applied the wrong standard for harmless-error review. Specifically, he argues (Pet. 10-13) that the court erroneously focused solely on the strength of the properly admitted evidence of guilt and failed to consider the impact of the error on the jury's verdict. The court of appeals applied the correct standard, and its decision does not warrant this Court's review.[2]

1. a. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." See

---

[2] Ford v. United States, petition for cert. pending, No. 12-7958 (filed Dec. 20, 2012), presents the same question.

Petitioner observes (Pet. 9) that this Court granted certiorari on a similar question in Vasquez v. United States, 132 S. Ct. 759 (2011) (No. 11-199), but dismissed the writ of certiorari as improvidently granted after oral argument, 132 S. Ct. 1532 (2012) (per curiam). Analysis of the cases indicates no conflict warranting review and, in any event, this case would not be an appropriate vehicle for review.

28 U.S.C. 2111. Outside of the narrow category of "structural errors," Neder v. United States, 527 U.S. 1, 7-8 (1999), the requirement that an error "affect substantial rights" to warrant reversal requires a reviewing court to examine the "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) (discussing Rule 52(a)); see United States v. Mechanik, 475 U.S. 66, 72 (1986).

This Court has established an objective test for harmlessness that asks whether "a rational jury would have found the defendant guilty absent the error," Neder, 527 U.S. at 18, eschews "a subjective enquiry into the [actual] jurors' minds," Yates v. Evatt, 500 U.S. 391, 404 (1991), and disregards errors that should not have altered the trial's "outcome" even though they might have "altered the basis on which the jury [actually] decided the case," Rose v. Clark, 478 U.S. 570, 582 n.11 (1986). See Pope v. Illinois, 481 U.S. 497, 503 n.6 (1987); Harrington v. California, 395 U.S. 250, 254 (1969) ("probable impact" on an "average jury"). That test requires "weigh[ing] the probative force of [all the] evidence" properly before the jury to determine whether the error was sufficiently "unimportant in relation to everything else" that it would not have altered the verdict. Yates, 500 U.S. at 403-405; see United States v. Lane, 474 U.S. 438, 448 n.11 (1986). An error of constitutional proportions judged under the standard in Chapman

v. California, 386 U.S. 18 (1967), is harmless if the evidence is "so overwhelming as to leave it 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). The Court has thus repeatedly made clear that such an error will be harmless where the evidence of guilt is so strong that "the jury verdict would have been the same absent the error." Neder, 527 U.S. at 17; see also, e.g., Schneble v. Florida, 405 U.S. 427, 430 (1972); Harrington, 395 U.S. at 254.

b. Petitioner argues (Pet. 7-8) that the proper standard for harmless constitutional error requires clarification, because, he contends, some of this Court's decisions have required a showing that the asserted error "did not contribute to the verdict obtained," Chapman, 386 U.S. at 24, and asked "what effect" the error "had upon the guilty verdict," Sullivan v. Louisiana, 508 U.S. 275, 279 (1993), while others like Harrington have looked to the "weight of the evidence against the accused" instead of the error's "effect" on the jury's verdict, Pet. 8 (citing Harrington). That is incorrect. The two purportedly distinct approaches reflect the same underlying concept. As the Court explained in Neder, if "a reviewing court concludes beyond a reasonable doubt" that the evidence of guilt is so strong "that the jury verdict would have been the same absent the error," the "error 'did not contribute to the verdict obtained.'" 527 U.S. at 17 (quoting Chapman, 386 U.S.

at 24); see Pet. 17 (acknowledging that Neder applied Chapman's standard). Thus, Harrington itself explained that the Confrontation Clause error before it was "harmless error under the rule of Chapman," 395 U.S. at 253, because the other evidence of guilt was "overwhelming," id. at 254. See also, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (citing Harrington and Schneble as examples of cases applying Chapman's standard).

Petitioner similarly contends (Pet. 8) that the harmlessness inquiry must focus on "whether the jury's verdict was influenced by the constitutional error" to preserve the "Sixth Amendment's jury-trial guarantee" and prevent "the appellate court [from] second-guess[ing] the jury." That contention misapprehends the inquiry. Harmless-error review applies after a judgment of conviction has resulted from the jury's "determination of guilt or innocence," and such review therefore "addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?" Rose, 478 U.S. at 582 n.11. As the Court held in Neder, "[a] reviewing court making th[e] harmless-error inquiry does not * * * 'become in effect a second jury to determine whether the defendant is guilty.'" 527 U.S. at 19 (citation omitted). It simply performs a "typical appellate-court" function when deciding whether an error is harmless based on the record of the case. Ibid.

Petitioner appears (Pet. 8) to rely on Sullivan, but that reliance is misplaced. Sullivan held that a defective reasonable-doubt instruction was a structural error that was not subject to harmless-error review because it "vitiate[d] all the jury's findings" such that no "jury verdict within the meaning of the Sixth Amendment" was ever rendered. 508 U.S. at 280-281. In that context, Sullivan stated that the Sixth Amendment's jury-trial guarantee requires a court to consider "what effect [the error] had upon the guilty verdict in the case at hand," not simply the effect that it might have had "upon a reasonable jury." Id. at 279. Neder has since made clear that this aspect of Sullivan's reasoning "cannot be squared with [the Court's] harmless-error cases" and does not apply where (as here) a jury has rendered a verdict of guilty beyond a reasonable doubt. Neder, 527 U.S. at 10-11, 17; see Washington v. Recuenco, 548 U.S. 212, 222 n.4 (2006) ("a broad interpretation of our language from Sullivan is inconsistent with our case law"). Similarly, petitioner's effect-on-the-actual-verdict argument is irreconcilable with Neder, which addressed an error that indisputably affected the actual jury verdict because it "prevent[ed] the jury from making a finding on [an] element" of the offense. Neder, 527 U.S. at 4, 10-11. Neder nevertheless found the error harmless based on the "overwhelming record evidence of guilt," because a "rational jury would have found the defendant guilty absent the error," i.e., the "verdict would have been the

same absent the error," id. at 17-18.

c. Petitioner contends (Pet. 10) that the court of appeals would have reversed if it had considered "the effect of the [asserted] constitutional error on the jury's verdict." But the premise of that contention is mistaken. The court of appeals determined "beyond a reasonable doubt" based on its own "thorough examination of the record" that the jury verdict "would have been the same absent the error." Pet. App. A7-A8 (quoting United States v. Barraza, 655 F.3d 375, 382 (5th Cir. 2011), cert. denied, 132 S. Ct. 1590 (2012)). That determination necessarily implies that, after considering the assumed "error" in its review of the entire record, the court concluded that it did not affect the verdict. The court's omission of a discussion of Lopez's and Mendez's testimony (Pet. 10-11) does not suggest otherwise; harmless-error determinations need not be extensive or detailed.[3] And published Fifth Circuit decisions discuss the nature and importance of the relevant error when articulating its harmless-error analysis.[4]

---

[3] See Jones v. United States, 527 U.S. 373, 404 (1999) (noting that a "detailed explanation" of a federal court's harmless-error analysis may be unnecessary); Sochor v. Florida, 504 U.S. 527, 540 (1992) (suggesting that a state court's "plain statement that the judgment survives" harmless-error review would be sufficient).

[4] See, e.g., United States v. Ashley, 664 F.3d 602, 604-605 (5th Cir. 2011), cert. denied, 132 S. Ct. 1651 (2012); United States v. Olguin, 643 F.3d 384, 393 (5th Cir.), cert. denied, 132 S. Ct. 432 and 439 (2011); United States v. Jackson, 636 F.3d 687, 697 (5th Cir. 2011).

Indeed, that court has emphasized that it "must judge the likely effect of any error" when conducting its "fact-specific and record-intensive" harmless-error review. See, e.g., United States v. Demmitt, 706 F.3d 665, 673 (5th Cir. 2013) (quoting United States v. El-Mezain, 664 F.3d 467, 526 (5th Cir. 2011), cert. denied, 133 S. Ct. 525 (2012)). The abbreviated discussion in the unpublished, non-precedential decision here cannot be assumed implicitly to reflect a different analytical framework.[5]

2. Petitioner cites (Pet. 13-15) two appellate decisions to support his claim of confusion and conflict in the courts of appeals. Neither reflects a conflict warranting review.

First, petitioner relies on the dissenting opinion in United States v. Nash, 482 F.3d 1209 (10th Cir.), cert. denied, 552 U.S. 1084 (2007), to assert that the Nash majority incorrectly ignored the effect of the erroneously admitted evidence in that case. Nash itself disproves that assertion. The Nash court made clear that it concluded that "the jury would have returned the same verdict absent the error" after considering how the erroneously admitted evidence "was used at trial" and "how it compare[d] to the properly

---

[5] Petitioner observes (Pet. 16) that some Fifth Circuit harmless-error opinions quote Chapman's discussion about whether an error "contributed to the conviction" while others emphasize the other evidence of guilt in finding an error harmless. But the two formulations are not inconsistent: when overwhelming untainted evidence establishes the defendant's guilt, the improperly admitted evidenced did not contribute to the verdict obtained.

admitted evidence." Id. at 1219 (citation omitted). Nash found the error harmless because "the properly admitted evidence of [the defendant's] participation in the offenses of conviction was 'so overwhelming, and the prejudicial effect of the' [erroneously admitted] statements 'so insignificant by comparison, that it is clear beyond a reasonable doubt'" that the error did not change the outcome. Ibid. (quoting Schneble, 405 U.S. at 430).

Petitioner's reliance on United States v. Cunningham, 145 F.3d 1385 (D.C. Cir. 1998), cert. denied, 525 U.S. 1059 and 1128 (1999), is similarly unavailing. Cunningham distinguished harmless-error review from a "sufficiency-of-the-evidence test" and relied on Sullivan to state that "harmless error review calls for an inquiry as to whether the Government has shown beyond a reasonable doubt that the error at issue did not have an effect on the verdict, not merely whether, absent the error, a reasonable jury could nevertheless have reached a guilty verdict." Id. at 1394, 1396 (emphasis added). That statement is consistent with the analysis of the court of appeals here. Unlike a question of evidentiary sufficiency, harmless-error review does not ask whether reasonable jury merely "could" have reached the same verdict; it requires (for constitutional error) a showing beyond a reasonable doubt that a rational jury "would" have reached the same verdict. Cunningham itself acknowledged that a reviewing court may find that a constitutional error did not affect the verdict when the properly admit-

ted evidence of guilt is "overwhelming," id. at 1396 (quoting United States v. Smart, 98 F.3d 1379, 1391 (D.C. Cir. 1996)), and in other contexts, the D.C. Circuit (like the court of appeals here) has found errors to be harmless based on the strength of the properly admitted evidence without expressly discussing the error's effect on the verdict. See, e.g., United States v. Ginyard, 444 F.3d 648, 655-656 (D.C. Cir. 2006); United States v. Kayode, 254 F.3d 204, 212 (D.C. Cir. 2001), cert. denied, 534 U.S. 1147 (2002).

Cunningham suggests -- based on Sullivan and a 1995 law-review article authored by Judge Edwards that itself relies heavily on Sullivan -- that an "'effect on the verdict' inquiry" is different from a "'guilt-based' inquiry," and indicates that the Sixth Amendment's jury-trial guarantee prohibits the latter to the extent that it "'hypothesize[s] a guilty verdict that was never rendered.'" 145 F.3d at 1394 (citing Harry T. Edwards, To Err is Human, But Not Always Harmless, 70 N.Y.U. L. Rev. 1197 (1995) (Edwards), and quoting Sullivan, 508 U.S. at 279). But Cunningham (and Judge Edward's article) preceded the Court's 1999 decision in Neder and did not survive Neder's analysis. Neder limited Sullivan's rationale to structural errors and made clear that harmless-error review reflects an objective test that considers the weight of the evidence of guilt when determining the error's likely

effect on the verdict. See pp. 12-13, supra.[6]

3. Petitioner argues (Pet. 10-13) that the Confrontation Clause error he asserts was not harmless because it affected the jury's verdict. That factbound contention merits no further review and, in any event, is incorrect. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

Petitioner's defense theory was that he agreed to transport the aliens to Austin because he was concerned about their physical safety, not to further their illegal presence in the United States. See Pet. App. A8. Petitioner testified that the aliens with whom he traveled had run out of food early on their cross-border journey, were "weak," and "were not doing well physically." Tr. 208, 215, 217. When asked why he agreed to give the aliens a ride, petitioner initially answered, "because they insisted." Tr. 218.

---

[6] Petitioner cites two post-Neder articles by legal practitioners, neither of which identifies a current division of authority warranting review. See Jason M. Solomon, Causing Constitutional Harm, 99 Nw. U. L. Rev. 1053, 1055 (2005) (stating that the debate about "two different and irreconcilable approaches" to harmless-error review "overstates the difference between the two approaches and obscures the shared normative ideal at the heart of harmless-error doctrine"); Brent M. Craig, What Were They Thinking?, 8 Fla. Coastal L. Rev. 1, 10 n.62, 14 & nn.93-94 (2006) (citing law-review articles predating Neder and two post-Nader articles: one that deems Neder "a perversion of Chapman" and another that recognizes that Neder "clearly[] has come down in favor of the overwhelming evidence standard" but asserts that Neder was "wrongly decided," Jeffrey O. Cooper, Searching for Harmlessness, 50 U. Kan. L. Rev. 309, 311-312 (2002)).

Only after petitioner's counsel asked petitioner whether he agreed to transport the aliens "because [he] felt bad for them" and "were worried about them" did petitioner respond, "Yes." Tr. 218. Petitioner later added that he did not want to leave the men because he "didn't want something to end up happening to them like them dying or something." Tr. 232.

The totality of the evidence fatally undermined that defense. Border Patrol agents testified that the aliens were tired and disheveled but did not need medical attention and were not "on the verge of collapse," that they did not ask for water, and that they looked "just like any other illegal aliens walking through the brush." Tr. 129, 140-141. Petitioner's own testimony also contradicted his defense. Petitioner admitted that no emergency existed during his four-to-five-day trek that warranted using his cell phone, Tr. 211, 213-214, 227-228; that "nobody was dying"; and that he never suggested to the other aliens that he would get them food or water, never called a hospital or the police for aid, and never mentioned that anyone in the group was "not * * * well" during his post-arrest interrogation, Tr. 227-228.

Even if petitioner had been genuinely concerned that the other aliens faced life-threatening harm, such concern would not have explained petitioner's agreement to transport them from the border all the way north to Austin, more than three hours away. At best, the purported concern might explain a decision to obtain food or

medical assistance or perhaps to provide a short ride to a populated area. But petitioner testified that he told the other aliens that he would take them to Austin from their border-town location "because [the aliens] were going to a place near Austin." Tr. 223 (emphasis added). That intent to facilitate the aliens' movement to their distant destination powerfully established petitioner's intent to further the aliens' illegal presence in the United States. As the court of appeals concluded, given that the evidence showed that petitioner did not offer the other aliens water (or sustenance) and that his agreed-to "destination for dropping off the others was Austin (over three hours away) and not a hospital, the only conclusion that could be drawn was that [petitioner's] transportation was with the intent to further [the aliens'] unlawful presence." Pet. App. A9.

In that context, the testimony of the two deposed witnesses was insignificant. Petitioner asserts (Pet. 11) without elaboration or citation that, "[f]or the most part," the witnesses "did not put their situation in such stark and desperate terms" as petitioner. But neither witness was asked about his own physical condition or that of any other alien. Mendez did state that no "emergenc[y]" required the aliens to surrender themselves to immigration officials, Mendez Dep. 17, but petitioner himself testified he carried a cell phone in case of an "emergency" and no emergency arose to warrant its use. Tr. 227-228. Indeed, the

government counsel (i.e., without "testimony and/or documentary evidence"). Pet. App. A8 & n.3. The court instead "assum[ed] arguendo" that the district court erred in finding those witnesses "unavailable" under the Confrontation Clause and conducted harmless-error review of that assumed error. Ibid. But because petitioner neither objected to the district court's acceptance of counsel's factual representations nor disputed the underlying facts (see pp. 4-6, supra), plain-error rather than harmless-error review would apply. See Olano, 507 U.S. 731-732. Petitioner has not shown that he carried his burden of establishing plain error (let alone error) from the court's reliance on proffered facts absent any dispute.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MYTHILI RAMAN
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

MAY 2013

---

[7] Petitioner's timely asserted contention that the government's actions failed to establish good-faith efforts (see pp. 5-6, supra) are insubstantial.