No. 19-5948

IN THE SUPREME COURT OF THE UNITED STATES

MARIA MARGARITA VALDEZ-ARAIZA, 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 introduction of certain witness testimony at trial did not constitute reversible plain error under Federal Rule of Criminal Procedure 52(b) because petitioner had not shown prejudice.

2. Whether the court of appeals correctly determined that the introduction of certain witness testimony at trial did not deprive petitioner of a fair trial and, accordingly, did not constitute reversible cumulative error.

RELATED PROCEEDINGS

United States District Court (D. Ariz.):

United States v. Valdez-Araiza, No. 16-cr-1057 (Jan. 17, 2018)

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

United States v. Valdez-Araiza, No. 18-10022 (July 1, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2019 WL 2743701.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2019. A petition for rehearing was denied on July 11, 2019 (Pet. App. 7a). The petition for a writ of certiorari was filed on September 12, 2019. 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 District of Arizona, petitioner was convicted on one count of making a false statement in the application and use of a passport, in violation of 18 U.S.C. 1542. Judgment 1. She was sentenced to 10 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed. Pet. App. 1a-6a.

1. Petitioner's Mexican birth certificate states that she was born on January 17, 1957, in Magdalena, Sonora, Mexico, under the name "Maria Margarita Araiza Valdez." Gov't C.A. Br. 4. It also lists the names of her Mexican parents. Ibid. Petitioner has acknowledged the certificate's authenticity. Ibid.

In June 2010, petitioner applied for a United States passport under the name "Maria Margarita Valdez" and a different date of birth of "January 17, 1956." Gov't C.A. Br. 5. The application listed her parents' names, but not their dates of birth. Ibid. She attached a copy of her driver's license, an English translation of a 2010 affidavit from her mother stating that petitioner was born in Arizona, and an affidavit of the grandson of the woman in whose home the birth allegedly occurred. Ibid. Petitioner did not, however, include her Mexican birth certificate. Ibid. When petitioner submitted her materials, she swore under penalty of perjury that she was a citizen or noncitizen national of the United

States and that her statements on the application were true and correct. Id. at 6.

Several weeks later, the State Department sent a letter advising petitioner that she needed to provide "necessary evidence of United States citizenship" because the "evidence she submitted is not acceptable for passport purposes." Gov't C.A. Br. 7 (brackets and citations omitted). Petitioner and her immigration attorney then provided additional information and documents, including petitioner's parents' marriage certificate in Mexico, a copy of her mother's nonimmigrant visa, and four certificates reflecting petitioner's completion of various adult education programs. Ibid. Petitioner again did not provide a copy of her Mexican birth certificate. Ibid. In September 2010, the State Department issued a United States passport to petitioner. Ibid.

In November 2010, petitioner filed an application with the Arizona Department of Health Services for a delayed birth certificate. Gov't C.A. Br. 8. Again using the name "Maria Margarita Valdez," petitioner stated that she had been born on "January 17, 1956" in Nogales, Arizona, and that her mother's residence at the time was "652 N. Tyler," an address that had in fact been occupied by an elementary school since the 1920s. Id. at 9-10 (citing photographs and land documents). She also attached a copy of her United States passport and many of the same documents that she had provided in her passport application. Id. at 8-9. Petitioner further represented that she did not have a registered

birth certificate in another state or country. Id. at 9. The Arizona Department of Health Services denied the application because petitioner's documents were insufficient and because its records showed that petitioner had a "registered birth certificate in the Country of Mexico." Id. at 10.[1]

2. In April 2011, the State Department sent a letter notifying petitioner that it had revoked her passport. Gov't C.A. Br. 11. The State Department explained that it had discovered petitioner's Mexican birth certificate and, "based on this new evidence and the totality of the circumstances," petitioner's "evidence does not support a claim of U.S. citizenship." Ibid. (citations omitted).

The Diplomatic Security Service opened an investigation into petitioner's conduct. Gov't C.A. Br. 13. Agents located petitioner's Mexican birth certificate and a nonimmigrant-visa record matching her name and date of birth. Ibid. In a previous visa application, petitioner listed her place of birth as Sonora, Mexico, and her nationality as Mexican. Ibid. Agents also located petitioner's Mexican national identity card, which matched the information on her Mexican birth certificate. Id. at 14. Finally,

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[1] Petitioner had unsuccessfully applied for a delayed Arizona birth certificate in 1996 as "Maria Margarita Valdez A." with a date of birth of "January 17, 1956." Gov't C.A. Br. 11 (citations omitted). She subsequently filed a pro se petition in Arizona state court, asking the court to recognize that she had been born in Nogales, Arizona on that date, and to order the Arizona Department of Health Services to give her a delayed birth certificate. The court dismissed the petition. Ibid.

agents located Mexican birth certificates for petitioner's three oldest daughters. The certificates stated the petitioner had appeared in person to present the children and that petitioner is a Mexican national. Ibid.

Separately, an Immigration and Naturalization Officer recalled a February 2001 encounter with petitioner in Tucson. Gov't C.A. Br. 15. Petitioner presented a border-crossing card, which serves the same function as a nonimmigrant visa, by authorizing a foreign national to enter the United States temporarily, in her name. Id. at 12, 15. She also told the officer that she was a citizen of Mexico and born in Mexico. Id. at 15.

3. A federal grand jury charged petitioner with one count of making a false statement in the application and use of a passport, in violation of 18 U.S.C. 1542. Indictment 1. The parties proceeded to trial. After the jury failed to reach a verdict, the district court declared a mistrial, and petitioner was retried. D. Ct. Doc. 81 (Apr. 3, 2017).

a. At the second trial, the government introduced the evidence described above to show that petitioner had falsely identified herself as a United States citizen on her passport application. The government also called witnesses from the federal and state agencies involved in petitioner's passport and birth-certificate applications. The testimony of three of those witnesses, although not objected to at trial, was later challenged

by petitioner on appeal. Pet. App. 2a-3a; Gov't C.A. Br. 29-30, 50, 53.

A United States Citizenship and Immigration Services (USCIS) agent testified about the requirements for obtaining United States citizenship, birth certificates, and other documentation. Gov't C.A. Br. 34. When the government asked whether anything in petitioner's administrative file would be a concern to a USCIS adjudicator, the agent cited petitioner's border-crossing cards and nonimmigrant visas. Ibid. He stated that the border-crossing card "would tell me that they weren't a U.S. citizen and that they were an alien." Id. at 35 (citation omitted).

A Department of State Fraud Prevention Manager testified that petitioner's passport application contained several areas of concern -- namely, the absence of the parents' complete information and birth dates; the parents' Mexican citizenship; petitioner's use of the last name Valdez; and the absence of a birth certificate. Gov't C.A. Br. 16. She further testified that U.S. citizens would have no reason to possess a nonimmigrant visa. Ibid. Finally, when asked whether the existence of a foreign birth certificate or registration would trigger concern during the State Department's review of a passport application, she said: "[I]f the person does not have a valid or certified, timely filed birth certificate in the U.S., and we locate a timely filed Mexican birth record, then that tells me * * * that the person was born in Mexico and not in the U.S." Ibid. (brackets in original).

An official at Arizona Department of Health Services explained the process for obtaining a delayed Arizona birth certificate. Gov't C.A. Br. 8. As part of that presentation, she testified about petitioner's use of her newly-issued 2010 passport to apply for a delayed Arizona birth certificate. Id. at 53.

b. During the defense case, petitioner asserted that she had been born in Arizona, had United States citizenship, and did not make a false statement on her passport application. Gov't C.A. Br. 18.

A Mexican-law expert testified about the benefits of Mexican citizenship, thereby suggesting that petitioner's father had good reasons to register her birth in Mexico even if she had been born in the United States. Gov't C.A. Br. 18-19. The expert agreed, however, that applicants must provide accurate and truthful information to Mexican authorities, and that identification of someone as a "national" on Mexican documents indicates Mexican citizenship. Id. at 19 (citation omitted).

An immigration attorney testified that she had helped petitioner apply for her passport and Arizona birth certificate. Gov't C.A. Br. 19. The attorney acknowledged that petitioner had produced a copy of her Mexican birth certificate, but that petitioner had omitted the document from her passport application and that it would have been "important" to the State Department's adjudication process. Ibid. (citation omitted).

Taking the stand in her defense, petitioner testified that, when she was 12 or 13 years old, her mother told her she had been born in Nogales, Arizona. Gov't C.A. Br. 21. Petitioner stated that her family had been visiting relatives in the United States when her pregnant mother started to feel pain after eating some food. Ibid. Petitioner's mother then remained at a friend's house instead of returning to Mexico. Ibid. When asked why her father subsequently registered her birth in Mexico, rather than the United States, petitioner stated that he was "always so very busy." Ibid. (citation omitted).

Petitioner admitted that, as an adult, she obtained border-crossing cards, which required proof of Mexican citizenship. Gov't C.A. Br. 21. Petitioner testified that she showed her Mexican birth certificate when obtaining those cards. Ibid. Petitioner further testified that she showed her Mexican birth certificate when registering her daughters' births in Mexico. Id. at 22.

Petitioner acknowledged that she had informed a U.S. immigration officer in 2001 that she had been born in Mexico. Gov't C.A. Br. 23. She also confirmed her Mexican birth certificate and national-identity card. Ibid. When asked about those documents, petitioner explained that her father "found a way to be able to register me because he knows people" and "[i]t was my father's doing." Id. at 24 (citation and ellipsis omitted).

At the end of her testimony, the district court allowed the jury to submit questions. One juror asked, "Your father is a civil

servant and yet he lied to another civil servant to get your birth certificate?" Gov't C.A. Br. 25 (citation omitted). Petitioner replied, "No. He had no reason to lie." Ibid. (citation omitted). Another juror asked "why were the parents' dates of birth left blank" on petitioner's passport application. Ibid. (citation omitted). Petitioner testified that she provided that information to her immigration attorney, who advised that "[i]t's all right" to omit that information from the application. Ibid. (citation omitted).

The jury found petitioner guilty. Judgment 1.

4. The court of appeals affirmed in an unpublished memorandum decision. Pet. App. 1a-6a.

Addressing challenges to testimony that petitioner had not raised in the district court, the court of appeals found that certain statements had been erroneously admitted. Pet. App. 3a. The court of appeals concluded that the USCIS agent's statement that, if presented with circumstances identical to petitioner's, he would conclude that the individual "w[as not] a U.S. citizen," but "an alien" improperly offered an opinion on an ultimate legal issue; that the State Department fraud-prevention manager "impermissibly offered opinion testimony given that she was a fact witness and not noticed as an expert"; and that the Arizona Health Department official "offered testimony regarding [petitioner's] use of the passport that was potentially prejudicial and of limited probative value," in violation of Federal Rule of Evidence 403.

Ibid. But because petitioner did not preserve her objections to this testimony at trial, the court of appeals reviewed her claims for plain error only. Id. at 2a-3a. And it "conclude[d] * * * that these errors did not 'affect the outcome of the district court proceedings.'" Id. at 4a (quoting United States v. Olano, 507 U.S. 725, 734 (1993) (brackets omitted)).

The court of appeals found that the "improper admission of the[] testimonies did not change the outcome of the trial." Pet. App. 4a. The court observed that "[t]he jury was instructed that it was free to accept or reject the experts' opinion testimonies." Ibid. The court also highlighted the government's admissible evidence, which provided "a reasonable foundation from which to conclude that [petitioner] was born in Mexico and not in the United States." Ibid. In particular, the court cited petitioner's Mexican birth record and her use of "nonimmigrant visas of the sort * * * reserved for non-U.S. citizens." Ibid. The court further stated that petitioner had "offer[ed] evasive and confusing responses" while testifying in her defense. Ibid. In particular, the court noted that when petitioner was asked "if her father lied to procure her Mexican birth record given her insistence that she was born in the United States," petitioner "repl[ied], 'No. He had no reason to lie.'" Ibid.

The court of appeals then rejected petitioner's challenges to the jury instructions and the district court's denial of a mistrial, and declined on direct appeal to address petitioner's

claim of ineffective assistance of counsel. Pet. App. 4a-6a. The court further rejected petitioner's claim of cumulative error. Id. at 6a. It determined that "the cumulative effect of the[] errors did not deprive [petitioner] of a fair trial." Ibid.

ARGUMENT

Petitioner contends that the court of appeals erroneously considered the credibility of her trial testimony (Pet. 6-14), and weighed the evidence in a light most favorable to the government (Pet. 14-16), when determining that the improper testimony during the government's case was nonprejudicial for purposes of plain-error and cumulative-error review. Those contentions lack merit. The court of appeals' nonprecedential, factbound decision does not conflict with any decision of this Court or any other court of appeals, and further review is unwarranted.

1. Because petitioner failed to object to the admission of the challenged testimony in the district court, petitioner may not obtain relief from that error on appeal unless she establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See Puckett v. United States, 556 U.S. 129, 134-135 (2009). Reversal for plain error "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Young, 470 U.S. 1, 15 (1985) (citation and internal quotation marks omitted). To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v.

United States, 520 U.S. 461, 467 (1997) (brackets in original) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)). "To satisfy th[e] third condition, the defendant ordinarily must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018) (citations and internal quotation marks omitted). If all three prerequisites are satisfied, the court of appeals has discretion to correct the error if it determines that "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. at 1905 (citation omitted). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

The court of appeals in this case correctly found that the admission of the disputed testimony did not satisfy the third prong of plain-error review, Pet. App. 3a-4a, which required petitioner to "make a specific showing of prejudice," Olano, 507 U.S. at 735.

First, the State Department employee neutralized potential prejudice by specifically disclaiming any "knowledge" of where petitioner was "actually born." Gov't C.A. Br. 50 (citation omitted). Second, the jury was instructed that it was free to accept or reject any expert testimony, including the USCIS agent's single contested statement, in light of all the other evidence in the case. Pet. App. 4a. No sound basis exists to conclude that the jury rested its verdict on the agent's snippet of conclusory

testimony given the ample, objective evidence regarding petitioner's birth in Mexico: nonimmigrant visas are reserved for foreign, not United States, citizens; petitioner had possessed such a visa; and petitioner had previously admitted to being a Mexican citizen. Gov't C.A. Br. 48-49. Third, the disputed testimony from the Arizona official was similarly harmless, given that other witnesses testified about petitioner's unsuccessful request for an Arizona birth certificate and petitioner herself chose to place into evidence the very documents used to support her failed application. Id. at 55.

The court of appeals thus correctly determined that the "improper admission of the[] testimonies did not change the outcome of the trial" so as to show prejudice for purposes of plain-error review. Pet. App. 4a. For similar reasons, the court correctly determined that "these errors did not deprive [petitioner] of a fair trial" in rejecting her cumulative-error claim. Id. at 6a; cf. Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978) ("cumulative effect" of errors can "violate[] the due process guarantee of fundamental fairness"). Further review of those factbound rulings is unwarranted.

2. Petitioner claims that the court of appeals committed two discrete errors: impermissibly weighing the credibility of her trial testimony (Pet. 6-14), and viewing the evidence in a light most favorable to the government (Pet. at 14-16). Those claims lack merit.

a. Petitioner asserts (Pet. 10) that the court of appeals impermissibly "invaded the jury's exclusive province to make credibility determinations." But the decision below did not weigh her credibility as a witness. The court simply noted petitioner's "evasive and confusing responses" during her testimony, Pet. App. 4a, as a preface to its observation that her testimony about the manner in which her father obtained her Mexican birth certificate -- namely, that her father "had no reason to lie" -- itself corroborated the government's case, ibid. Petitioner's expert testified that to obtain the Mexican birth certificate, petitioner's father had to make a public attestation to a civil registry official regarding petitioner's nationality. D. Ct. Doc. 222, at 24-25 (Apr. 11, 2018). Either petitioner's father made a false attestation of that fact (a possibility that petitioner disclaimed), or the certificate accurately documented petitioner's birth in Mexico -- exactly as the government's evidence had established.

In addition, in assessing whether the challenged testimony was prejudicial, the court of appeals was not required simply to assume that the jury would have credited petitioner's own self-serving, contradictory explanations for the certificate's existence. See, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (noting that "reviewing courts" may consider "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points" when assessing

"[w]hether * * * an error is harmless in a particular case"); Phelps v. Duckworth, 772 F.2d 1410, 1414 (7th Cir.) (en banc) ("[I]mplausible or highly contradictory testimony offered by the accused has properly been rejected as basis for reversal in th[e] [harmless-error] context."), cert denied, 474 U.S. 1011 (1985); Chapman v. United States, 547 F.2d 1240, 1249 (5th Cir.) (finding constitutional error harmless where "[e]vidence of [the defendant's] guilt was so strong and his exculpatory story [was] so implausible"), cert. denied, 431 U.S. 908 (1977); see also Juarez v. Minnesota, 217 F.3d 1014, 1017 (8th Cir. 2000) (harmless error where contested evidence "was only a small part of the record evidence relating to [the defendant's] credibility"); United States v. Hands, 184 F.3d 1322, 1331 (11th Cir. 1999) ("When we assess the strength of the government's case for purposes of harmless error analysis * * * , we may take into account factors -- such as incentives to lie -- that would have affected the jury's assessment of a witness's testimony."). Petitioner has cited no authority to the contrary.[2]

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[2] In claiming that the court of appeals applied the wrong standard, petitioner notes (Pet. 11) the court's citation to United States v. Kenny, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920, and 454 U.S. 828 (1981). There, the court observed that "[w]hen the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth." Id. at 1346. That observation, while made in the context of a sufficiency claim, also supports the proposition that prejudice analysis need not assume that the jury would accept a defendant's implausible or contradictory testimony at face value.

b. Petitioner further contends (Pet. 14-16) that the court of appeals impermissibly considered the trial evidence in a light most favorable to the government by "effectively reason[ing] that the trial errors were harmless because a rational trier of fact could have found the elements of the crime by drawing reasonable inferences." Pet. 15. Petitioner again misinterprets the decision below.

In the portion of the decision petitioner cites (Pet. 15), the court applied the plain-error standard from United States v. Olano, supra, and asked whether the forfeited errors "affect[ed] the outcome of the district court proceedings," Pet. App. 4a (citation omitted). The court cataloged the admissible evidence showing that petitioner had nonimmigrant visas and a Mexican birth record, which, it concluded, "creat[ed] a reasonable foundation from which to conclude that she was born in Mexico and not in the United States." Ibid. That discussion reflects the court's independent assessment of those trial exhibits, not a survey about permissible inferences that a jury might draw from them, as reflected in the court's subsequent "conclu[sion] that improper admission of th[o]se testimonies did not change the outcome of the trial." Ibid. That conclusion belies petitioner's contention that the court "'merely [asked] whether there was enough evidence to support the result' * * * absent the error." Pet. 14 (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)) (brackets omitted). In any event, the court of appeals has issued published

decisions confirming its view that "[t]he [harmless-error] inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." Gill v. Ayers, 342 F.3d 911, 921 (9th Cir. 2003) (quoting Kotteakos, 328 U.S. at 765). Any contrary suggestion in the unpublished decision below would not warrant review in this Court. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner briefly asserts that the court of appeals "did not acknowledge any of the testimony supporting the defense." Pet. 16 (citation, emphasis, and internal quotation marks omitted). But the court expressly considered petitioner's key evidence -- her testimony that she had been born in Arizona -- and ultimately rejected petitioner's claim of plain error based on the other, ample trial evidence (including petitioner's testimony regarding her Mexican birth certificate) showing her birth in Mexico. See pp. 13-15, supra. The court was not obligated to include a more detailed discussion of the trial record, and the absence of one does not justify this Court's plenary review. It is a long-established principle that this Court "reviews judgments, not opinions," Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984), and the decision below is, moreover, nonprecedential. The record supports the court of appeals' judgment that no reversible plain error or cumulative error occurred at petitioner's trial, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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