No. _____

IN THE SUPREME COURT OF THE UNITED STATES

═══════════════════════

MARIO RUBI,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

═══════════════════════

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

═══════════════════════

DEVIN BURSTEIN
Warren & Burstein
501 W. Broadway, Suite 240
San Diego, California 92101
Telephone: (619) 234-4433
Facsimile: (619) 234-4433

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred in finding Mr. Rubi opened the door to expert testimony regarding unknowing couriers based on a few isolated questions about fingerprints.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

IN THE SUPREME COURT OF THE UNITED STATES

═══════════════════════

MARIO RUBI,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

═══════════════════════

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

═══════════════════════

Petitioner Mario Rubi respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

In an unpublished memorandum, the Ninth Circuit affirmed petitioner's conviction and sentence. *United States v. Rubi*, No. 18-50207 (9th Cir. 2019).[1]

JURISDICTION

On August 23, 2019, the Ninth Circuit denied the petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

STATEMENT OF THE CASE

A. The arrest.

Mr. Rubi was driving to work in the United States. ER:5, 47. While waiting to cross at the port of entry from Mexico, a federal officer approached the vehicle with a drug-sniffing dog. ER:5, 46. The dog alerted to the gas tank. ER:46.

[1] A copy of the memorandum is attached as Appendix A.

The officer questioned Mr. Rubi, who explained the car belonged to his boss, but he had been using it for three months. ER:47. During the interaction, Mr. Rubi was cooperative, did not hesitate, and he did not appear nervous, even after the officer told him there would be a further inspection. ER:53-54.

During that inspection, officers found methamphetamine and heroin hidden in the gas tank. ER:74, 77, 86-87. The officers arrested Mr. Rubi. ER:87-88. He again told them he had been working as a driver for about three months. ER:103-04, 361. Although he could not recall the exact name of the company, he explained it was located in Chula Vista, California, and the address was in his phone. ER:103-04, 361. He denied knowledge of the drugs. ER:408.

B. The district court proceedings.[2]

The government charged Mr. Rubi with two counts of drug importation under 21 U.S.C. §§ 952, 960. ER:1-2.

The theory of prosecution was straightforward. As explained during opening statements, in the government's view, "the only explanation for the evidence in this case is that the defendant knew he was bringing drugs across the border[.]" ER:27.

[2] In this section, Mr. Rubi provides an overview of the district court proceedings. Additional facts are included with the relevant arguments.

The defense provided a different account. After Mr. Rubi was laid off from an upholstery job, he moved in with his mother in Tijuana. ER:29-30. While there, he answered a help-wanted advertisement seeking people who could cross the border. ER:30. He spoke to a man named Alfredo, who explained a construction company needed people to drive personnel and materials between the pickup spots and the job sites. ER:31.

The defense further explained to the jury that Mr. Rubi was told to meet Alfredo near the border on the Mexico side, where he would pick up the company car to take into the United States. ER:31. For several months, he crossed as instructed, dropped the car off at a specified location, and returned to Mexico, where he was paid. ER:32. Given the short distances, Mr. Rubi never put gas in the car. ER:34. And he did not know anything about the drugs found when he was arrested. ER:34-35.

After opening statements, the government called the officers who encountered Mr. Rubi at the border, interviewed him, and investigated the case. ER:36-105. The government also called a witness to testify regarding text messages found in Mr. Rubi's phone. ER:106. She reported that Mr. Rubi had texted someone regarding a gas leak in a car, although it was unclear whether he was discussing his personal car or his boss's. ER:112. Additionally, there were text messages

between Mr. Rubi and Alfredo regarding different jobs. ER:114-16, 161. But none of the messages related to drugs or smuggling.

The case agent then testified that the car Mr. Rubi was driving was registered to Camacho Trucking. ER:128. The agent, however, was unable to locate this business. ER:129, 132. Additionally, the agent testified that, in the months before his arrest, Mr. Rubi crossed the border in the same vehicle approximately 11 times. ER:182. But "there [was] no indication that there [were] any drugs in the gas tank on any other [occasion]." ER:186.

Finally, the government called its value expert, Agent Kiesel. He testified about the value of the drugs increasing once they crossed from Mexico into the United States. ER:215-21. He also testified that drug trafficking organizations do not generally utilize unknowing couriers. ER:221-28, 234-40. Over repeated objections, the court ruled this testimony was admissible because the defense "opened the door" by questioning a different agent about the government's failure to fingerprint the drugs or the gas tank. ER:149, 205.

Following this testimony the government rested, as did the defense. ER:241-42. The jury convicted Mr. Rubi on both counts. ER:437. The district court imposed an 86-month sentence. ER:438.

C. The appeal.

On appeal, Mr. Rubi argued the district court erred in finding that a few questions about the lack of fingerprints opened the door to unknowing courier testimony.

The Ninth Circuit affirmed, concluding: "Defendant 'opened the door' to modus operandi evidence by asking Agent Kiesel whether the drugs, fuel pump, or gas tank had been fingerprinted and later as to the use of unknowing couriers." APP:A at 3.

This petition for a writ of certiorari follows.

REASON FOR GRANTING THE PETITION

Review is warranted to correct the Court of Appeals application of the so-called "open the door" doctrine.

The Court of Appeals erred in concluding a few questions about the lack of fingerprints opened the door to unknowing courier testimony. The court misapplied the "open the door" doctrine. When a defendant opens the door, only evidence that rebuts the defense's point is allowed through. In other words, the doctrine does not allow introduction of other, tangentially-related evidence. Thus, here, because the lack of fingerprints was not explained or rebutted by the expert opinion on unknowing couriers, the former could not – and did not – open the door for the latter.

A. Relevant facts.

Before trial, the government provided notice of its intent to call an expert – Special Agent Peter Kiesel – to testify about the wholesale and retail value of the methamphetamine and heroin found in the vehicle. ER:18. Following opening statements, however, the government requested that, in addition to value, the court permit Agent Kiesel to opine about "why drug trafficking organizations do not use blind mules [unknowing couriers], why it is not a good idea for them to use blind mules." ER:61. The defense objected. ER:61-63. The district court initially sustained the objection, ER:61-63, but then reversed courses, after defense counsel asked cross-examination questions about the lack of fingerprints on the drugs and gas tank. ER:94, 153, 205.

Specifically, defense counsel engaged in the following colloquy with the officer who found the drugs in the gas tank:

Q. Did you submit [the drug packaging] for fingerprints?

A. No.

Q. Did you submit the fuel pump for fingerprints?

A. No.

Q. How about the gas tank?

A. No.

ER:94.

Based on this brief exchange, the district court concluded the defense "opened up [the door to] the modus operandi evidence[.]" ER:147. The court continued, "soliciting evidence that there is no fingerprints or they didn't test for fingerprints, I think that does open it[.]" ER:148. The court determined, "when the defense offers that, lack of fingerprints, [] under those circumstances the Government can then offer evidence of unknowing -- the unknowing courier evidence, which deals with modus operandi." ER:149. "I find that, you know, the evidence concerning knowing and unknowing couriers is admissible in light of the issues with -- the questions raised with respect to the fingerprints." ER:205.

Additionally, beyond the testimony about unknowing couriers, the court would allow the government's expert to offer "an explanation as to why the driver – why the[] [agents] didn't test for fingerprints and . . . whether a driver would typically load the drugs into the gas tank or remove them from the gas tank[.]" ER:152.

In summary, the court found that the defense's limited cross-examination regarding the lack of fingerprints opened the door to: (a) unknowing courier testimony – that drug organizations do not use so-called blind mules; and (b) limited structure testimony – that drug organizations compartmentalize the roles of their

employees such that drivers do not typically load or unload the drugs, and thus their fingerprints will not appear on the packaging.

The government took full advantage of the district court's ruling. After Agent Kiesel testified regarding the value of the drugs, the government elicited structure testimony. ER:222-25.

On cross-examination, to combat the inference that Mr. Rubi was a paid driver for a highly-structured drug cartel, the defense inquired as follows:

Q. [A] driver or a courier is someone who transports drugs from one place to another; correct?

A. Yes.

Q. And an unknowing courier is someone who does not know that they are being used to transport drugs?

A. That's correct.

Q. Is this also sometimes recovered to as a blind mule?

A. It is.

Q. And if someone does not know they are being used to transport drugs, two things are important for the drug trafficking organization to get the drugs back, that is, access and opportunity, wouldn't you agree?

A. Yes.

Q. So if an organization were to hide drugs in a vehicle, the organization would need to know where that person was driving their car and when that person was driving their car?

A. That would help, yes.

Q. And so they would need to know where that person is going?

A. Yes.

Q. And they would -- so that way they would have the opportunity to get the drugs out of the car once it arrived at its location?

A. Correct.

Q. And you would agree that if someone knew when an individual was crossing into the United States and where the person in the United States were going, that is the type of person who can get used unknowingly to transport drugs?

A. Yes.

Q. And reliability of a driver is key?

A. Could you --

Q. So having a driver that you know will reliably go to a location that is designated?

A. You mean like consistently or --

Q. Or follow directions?

A. Okay. Yes.

Q. And by the same measure of predictability of a driver is key?

A. Correct.

ER:227-28.

Thereafter, on redirect – and despite the fact that the defense never asked whether drug organizations in fact utilize unknowing couriers – the government asked the agent to opine on that specific topic.

Q. Based on your experience, do these advertisement cases usually involve individuals who had no knowledge that they were being hired to transport narcotics?

Defense: Objection, lacks foundation.

The court: Overruled.

A. No.

ER:234-35.

Q. Agent Kiesel, you heard defense counsel mention the term 'blind mule'; is that correct?

A. Yes.

Q. What is a blind mule?

A. A blind mule is basically a nickname term given to a driver who does not know that there [are] narcotics in the vehicle.

Q. Based on your experience do drug traffickers usually use blind mules in their operations?

A. No.

Q. And why is that?

A. Using blind mules, there is a lot of risk involved. You don't have control over the vehicle. You don't have necessarily a pick-up time, an exact drop-off point. Blind mules will sometimes be consistent with using exterior mechanisms, such as magnets or spare tires where the vehicle and the drivers don't have to be involved so those things can be removed without the knowledge of the driver.

Q. And in the over -- I think, I believe, 700 investigations that you participated in, have you ever had a case involving a blind mule?

A. I personally have not.

ER:237-38.

The defense responded by pointing out that there are instances when unknowing couriers are utilized:

Q. You just said that -- or you just testified that in the course of your investigations, you never had known of a case involving a blind mule; correct?

A. I have not personally had a case.

Q. Yes. But you had -- you do know that that exists?

A. Yes, ma'am.

Q. You also testified that in your opinion that drug trafficking organizations don't use blind mules because of the elevated risk?

A. Correct.

Q. But a way to mitigate that risk would to be -- to have some sort of control over the driver; correct?

A. That would.

ER:238.

Finally, on a second redirect, the government concluded with the following:

Q. Agent Kiesel, you just spoke a little bit about limiting risks with the use of blind mules. In your experience -- in your experience, do drug trafficking organizations limit risk by just hiring the individuals to work for drug trafficking organizations instead of using them as blind mules?

A. Yes.

ER:240.

This was the final piece of evidence in the trial.

B. The Court of Appeals' precedent on structure testimony.

To put this case in its proper perspective requires a review of the relevant Ninth Circuit Court of Appeals' precedent on the admissibility of evidence regarding

drug trafficking organizations and unknowing couriers. That review begins with *United States v. Vallejo*, 237 F.3d 1008 (9th Cir. 2001).

1. *Vallejo.*

In *Vallejo*, the defendant was driving from Mexico into the United States, when agents found drugs hidden in his car. *See id.* at 1013. At trial, the only issue was whether the defendant knew about the drugs. *See id.* at 1017. The government's expert testified about how drug trafficking organizations divide responsibilities among the people who grow, store, smuggle, and sell drugs. *See id.* at 1013-14.

On appeal, "the Government explained that it [] routinely introduces the structure of drug trafficking organizations in every drug importation prosecution to make up for the lack of fingerprints on the drugs in question. According to the Government, the absence of fingerprints is always raised by defendants as evidence that they did not put the drugs in the car and therefore did not know the drugs were there." *Id.* at 1016.

The court rejected that explanation, pointing out that the defendant had not in fact raised "the lack of fingerprint evidence." *Id.* Further, the court held that "structure" testimony is generally improper under Federal Rules of Evidence 401 and 403: "[the expert] testified to the different roles played by various members of

drug trafficking organizations, and although he did not cast [the defendant] in a particular role, the implication of his testimony was that [he] had knowledge of how the entire organization operated, and thus knew he was carrying the drugs. To admit this testimony on the issue of knowledge, the only issue in the case, was unfairly prejudicial, and an abuse of discretion[.]" *Id*. at 1017.

Indeed, the testimony "portrayed [the defendant] as a member of an enormous international drug trafficking organization and implied that he knew of the drugs in his car because of his role in that organization. This expert testimony connected seemingly innocent conduct to a vast drug empire, and through this connection, it unfairly attributed knowledge -- the sole issue in the case -- to Vallejo, a single individual, who was not alleged to be associated with a drug trafficking organization in even the most minor way." *Id*.

However, in reaching this conclusion and vacating the conviction, the court also noted: "This case does not involve the Government's use of 'unknowing courier' testimony, in which a law enforcement official testifies that certain drug traffickers do not entrust large quantities of drugs to unknowing transporters. Therefore, we do not address the admissibility of such testimony." *See id.* at 1017 n.3, *amended*, 246 F.3d. 1150 (9th Cir. 2001).

2. *Murillo.*

The court turned to that question in *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001). *Murillo* was another drug case centered on the defendant's knowledge. *See id.* at 1178. The government elicited expert testimony regarding: "(1) whether in [the agent's] experience, drug traffickers entrusted thousands of dollars of drugs to couriers who did not know they were transporting them and (2) why, in his experience, traffickers did not do so." *Id.*

The court found this a permissible topic of expert testimony under Federal Rule of Evidence 704. *See id*. at 1177-78. Part of the rationale was that, "[i]n contrast to [*Vallejo*], *Murillo* designated a fingerprint expert before trial and argued in his defense at trial that no fingerprints were found on the drug packages. We acknowledged the significant import of this factual difference in *Vallejo*." *Id.* at 1177.

3. *Pineda-Torres*.

A year after *Murillo*, the court returned to the Rule 403 analysis. In *United States v. Pineda-Torres*, 287 F.3d 860, 863 (9th Cir. 2002), once again, "[t]he only element at issue in the trial was whether [the defendant] knew that the drugs were in the car." Before trial, the district court ruled the government could elicit testimony as to the following:

> (1) the drivers of load vehicles typically do not own the drugs they are transporting; (2) the driver of a load vehicle is typically not the person responsible for loading the drugs into the car, and, accordingly, fingerprinting is generally not a useful tool in the investigation of border busts; and (3) the driver of a load vehicle is typically not entrusted with transporting the vehicle to a load house, but usually only to a neutral site.

Id. at 862-63. Based on this ruling, "the defense cross-examined the government's witnesses about their failure to obtain fingerprints from [the] vehicle." *Id.* at 863.

A government expert then testified over objection that, "in a drug trafficking organization, all of the functions are compartmentalized with each member having a specific duty. . . . . He also testified on direct that fingerprinting drug packaging would not be a valuable tool during drug courier investigations because drug trafficking organizations are intentionally structured so that drivers do not load the drugs into the car." *Id.*

On appeal, the court held the testimony was erroneously admitted. Applying Federal Rule of Evidence 403, it expressly rejected the government's proffered justification, "that the purpose of the expert testimony was to show that [defendant] knew that drugs were in the car." *Id.* at 865. Additionally, the Court "reject[ed] the government's contention that in this case defense counsel 'opened the door' to the drug structure testimony by cross-examining the customs agents about their failure to lift fingerprints from the drug packages and the vehicle." *Id.* It

explained that, because the district court had previously ruled the testimony admissible, the defense was merely asking anticipatory questions about a subject it knew the government would introduce. *See id*. And "[u]nder these circumstances, we cannot conclude that it was the defendant who 'opened the door.'" *Id*. at 866.

4. *Varela-Rivera.*

Following on the heels of *Pineda-Torres*, in *United States v. Varela-Rivera*, 279 F.3d 1174 (9th Cir. 2002), the court considered a combination of structure and unknowing courier testimony. The "defense was based entirely on the contention that [the defendant] did not know the drugs were in the car." *Id.* at 1177. Over objection, the government's expert testified as to structure and that "a drug smuggler would not risk using an unknowing courier to transport drugs." *Id*.

The court reversed the conviction, finding the entirety of the testimony impermissible. *See id*. at 1179-80. It determined, "expert testimony on the modus operandi of drug trafficking organizations is inadmissible in cases where, as here, the defendant is not charged with conspiracy to distribute drugs." *Id.* at 1179. Thus, without differentiating between the structure and unknowing courier evidence, it held, "admission of this testimony was an abuse of discretion." *Id*.

5. *Sepulveda-Barraza*.

Finally, in *United States v. Sepulveda-Barraza*, 645 F.3d 1066, 1068 (9th Cir. 2011), the court again considered the admissibility of "expert testimony regarding the structure and operations of drug-trafficking organizations and unknowing drug courier modus operandi, including testimony that drugs are rarely smuggled by unknowing couriers." The court held "the district court did not abuse its discretion in admitting this testimony . . . *because* [the defendant] opened the door to the testimony by providing notice that he intended to call an expert witness to testify that drug trafficking organizations sometimes utilize unknowing couriers to smuggle drugs across the border." *Id.* (emphasis added).

The court explained, "[t]estimony regarding the use of unknowing couriers by drug trafficking organizations is a subset of testimony about drug trafficking operations generally. Accordingly, . . . such evidence is admissible under the broad, case-by-case standard of Rule 403." *Id.* at 1072. Applying that standard, the court noted that, "[b]ecause [the defendant] provided notice that he would call an expert to testify regarding drug trafficking organizations' use of unknowing couriers, [the government's expert's] testimony made it less probable that [the defendant] was acting as an unknowing courier, and therefore the evidence was relevant." *Id.* Moreover, *because* the defendant specifically opened the door to

expert testimony that "'drug cartels' sometimes use 'blind mule' couriers to smuggle drugs across the border," – indeed, he noticed his own expert on the subject – plainly, "the probative value of the evidence was not 'substantially outweighed by the danger of unfair prejudice[.]'" *Id.* at 1072-73 (citation omitted).

C. Precedent does not support the introduction of unknowing courier testimony under the facts here.

From this precedent, considered in its totality, several rules or principles emerge:

First, "structure" testimony is generally inadmissible in non-conspiracy drug importation cases when knowledge is the sole point of contention. *See Vallejo*, 237 F.3d at 1017. Second, a defendant may open the door to limited expert structure testimony by raising a defense based on a lack of fingerprints on the drugs. *See Pineda-Torres*, 287 F.3d at 865. Such a defense can invite an explanation that, due to the structure of drug organizations, a courier's fingerprints are unlikely to appear on the drugs. *See id.* Third, and specific to unknowing courier evidence, when a defendant notices an expert to provide testimony about unknowing couriers, the government may anticipatorily introduce such evidence in its case-in-chief. *See Sepulveda-Barraza*, 645 F.3d at 1072-73.

Although the general principles are informative, they do not answer the question here: Does a brief cross-examination about a lack of fingerprints open the door to the government eliciting expert testimony about unknowing couriers?[3]

The district court held that it did. In the court's words: "my ruling is that the defense has opened the door to certain testimony that *I otherwise would not have permitted*. And the testimony that they can -- that I would now permit, that I previously would not have permitted, deals with modus operandi evidence . . . that is usually referred to as *unknowing courier* testimony." ER:150 (emphasis added).

This ruling makes clear: (1) the district court would not "otherwise" have permitted the government's expert to testify regarding unknowing couriers but for the fact that (2) it concluded the defense's fingerprint questions opened the door. But this second conclusion was erroneous. The fingerprint questions did not open the door to the unknowing courier testimony.

"[T]he 'opening the door' doctrine is not so capacious as to allow the admission of *any* evidence made relevant by the opposing party's strategy, without regard to the Federal Rules of Evidence." *United States v. Sine*, 493 F.3d 1021,

[3] At the outset, it warrants repeating that *Murillo* did not resolve this question. As noted, in that case, the court ruled on the admissibility of unknowing courier testimony under Rule 704, but it did *not* consider the Rule 403 question or other issues of admissibility. *See United States v. McGowan*, 274 F.3d 1251, 1255 (9th Cir. 2001).

1037 (9th Cir. 2007) (emphasis in original). Rather, "the 'opening the door' principle allows parties 'to introduce evidence on the same issue to rebut any *false* impression that might have resulted from the earlier admission.'" *Id.* (citation omitted, emphasis in original). And most important, "[t]he doctrine does not permit the introduction of evidence that is related to a different issue or is irrelevant to the evidence previously admitted." *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988).

Here, asking about the lack of fingerprints "opened the door" only to evidence on that issue – i.e., there was no need for fingerprints because drug organizations segment the jobs such that drivers almost never touch the drugs. Expert testimony about the likelihood of a drug organization using an unknowing courier, however, was nonresponsive to the fingerprint questions. Certainly, it did not explain why the agents did not attempt to lift fingerprints from the drug packaging.

Nor did it respond to any other evidentiary point made by the defense. To the contrary, it was "irrelevant to the *evidence* previously admitted." *Id.* (emphasis added). Indeed, prior to the district court's ruling, there had been no testimony regarding unknowing couriers. Accordingly, the district court erred in finding the isolated lack-of-fingerprint questions opened the door to the blind mule testimony, and the Court of Appeals erred in affirming his conviction. This Court,

therefore, should grant Mr. Rubi's petition to correct that error, clarify the scope of the "open the door" doctrine, and articulate how it accords with Federal Rule of Evidence 403.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

s/ Devin Burstein

Dated: November 5, 2019

DEVIN BURSTEIN
Warren & Burstein
501 West Broadway, Suite 240
San Diego, CA 92101
(619) 234-4433