No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ADALBERTO MAGANA-GONZALEZ

Petitioner

-v-

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael Marks
Federal Defenders of San Diego
225 Broadway, #900
San Diego, California 92101
(619) 234-8467
Michael_Marks@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Whether the district court committed prejudicial error under the Sixth Amendment when it permitted a DEA agent to tell the jury what a Border Patrol agent had said about drug smuggling outside of court in preparation for trial.

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OPINION BELOW

After Petitioner appealed his conviction for illegal reentry of a deported alien, in violation of 8 U.S.C. § 1326, the United States Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction in an unpublished memorandum disposition. *United States v. Magana-Gonzalez*, 781 F. App'x 615 (9th Cir. 2019).[1]

JURISDICTION

The court of appeals entered final judgment on October 22, 2019. This Court has jurisdiction over a timely-filed petition under 28 U.S.C. § 1254(1).

[1] A copy of the Ninth Circuit's memorandum is attached to this brief at Appendix A under S. Ct. R. 14(i)(i).

RELEVANT PROVISIONS

Sixth Amendment In all criminal prosecutions, the accused shall enjoy the right to . . . to be confronted with the witnesses against him.

STATEMENT OF THE CASE

A. Border Patrol arrested Petitioner on suspicion of illegal entry.

On July 31, 2017, a Border Patrol agent using an infrared scope saw Petitioner walking alone north from the United States-Mexico Border near Otay Mesa, California, in San Diego County. The landscape is rural and rugged, but the area in Mexico just south of the border is a part of Tijuana, Mexico, full of warehouse and residences. The scope operator contacted another agent and guided him towards the person he had observed through the scope. The second agent came upon Petitioner "just kind of sitting there" in the brush. Petitioner did not flee and complied with the agent's commands. Petitioner told the agent he was a citizen of Mexico with no right to be in the United States. The agent then placed Petitioner under arrest.

B. During his post-arrest interrogation, Petitioner explains that he entered the country illegally to avoid smuggling drugs in a backpack.

A Border Patrol agent interrogated Petitioner after the arrest. Petitioner told the agent he had entered the United States "where they arrested me" by jumping over a fence near Otay Mesa, California. Petitioner admitted that he had been previously deported, and acknowledged he knew it was illegal for him to enter the United States.

The agent asked Petitioner, "With what purpose did you enter the United States this time?" Petitioner responded:

> Because in Tijuana, when I left, I had no money and I arr-arrived to a place where they give you- food and shelter for three days. And then, afterwards, I met some, some people and they took me to other people and they wanted me to cross with a backpack full of drugs. And I don't want to do that. I have many problems I don't need to add crossing with drugs. And that's it . . .

The agent asked Petitioner if he was "afraid of persecution or torture if [he was] removed from the United States." Petitioner responded, "Mmm . . . I never used to. This time I am afraid because those people are always there. But fear . . . fear . . . that you would say . . ." The agent cut him off, demanding a "yes" or "no" answer. Petitioner responded, "Yes."

C. Petitioner's case proceeds to trial.

The government charged Petitioner with illegal reentry of a removed alien, in violation of 8 U.S.C. § 1326, and the case went to trial. During its opening statement, the government contended that Petitioner had entered the United States without permission after having previously been removed. Petitioner responded that he had been kidnapped by drug traffickers who threatened him to cross drugs into the United States. Instead of committing that serious crime and to avoid the wrath of the traffickers and corrupt Mexican law enforcement, Petitioner fled into the United States out of necessity.

D. Petitioner testifies about being kidnapped in Mexico and escaping into the United States to avoid smuggling drugs.

Petitioner testified in his own defense. He quickly confirmed his prior removals and admitted that he had previously been arrested attempting to sneak into the United States illegally. But he explained that his most recent arrest was a different story.

Petitioner had been deported to Tijuana. His family lived 2800 miles away in Jalisco, Mexico. Without any family in Tijuana, Petitioner stayed at a shelter for recent deportees. While there, he spent his days searching for work; he was able to make a little money helping to build a brick wall a few days after he arrived. The next day, he and two other residents of the shelter went to follow another lead for work.

A man transported them to a house in a van. Petitioner had helped build a house before, and he had stayed at the house while he worked. He believed this job presented the same arrangement. But the man who took him to the house soon informed the group that they would be expected to carry drugs in backpacks into the United States. The man claimed to be part of the Nueva Generacion drug cartel from Jalisco, Mexico. Petitioner said he didn't want to do it, but the man, armed with a gun tucked in his waistband, said, "[Y]ou're here, you'll do it or you'll do it." Petitioner understood the man's threat, and he froze inside the house.

The next day, the men informed Petitioner and his companions that they were going to be moved to another house in Sonora, Mexicali, or El Hongo, all locations in Mexico far away from Tijuana. The men walked outside to await

transport. Petitioner could see the border fence a short distance away. Suddenly, one of the men attempted to flee. When the guard ran after him, Petitioner also ran away.

Petitioner immediately headed toward the border. South towards Tijuana, he was afraid of encountering other members of the cartel or corrupt police, who he knew were connected to the cartel. He knew it was illegal to enter the United States, but he realized "over there they're going to arrest me. But over here they're going to kill me."

Without a plan, Petitioner instinctively jumped over the fence as soon as he could. Petitioner soon heard a car coming, and he "thought it was the bad guys that were going to find [him]." So he hid in some nearby brush. "When I saw it was immigration," Petitioner testified, "I felt in my heart that he had saved me."

E. After their first expert becomes unavailable, the government finds DEA Agent Plennes to offer expert testimony about drug smuggling at the border.

The government intended to call an HSI Agent as an expert to rebut Petitioner's testimony. The day before his testimony, however, the agent became unavailable due to family obligations.

As a substitute, the government called DEA Agent Chad Plennes. Petitioner objected to Plennes's testimony, and the district court conducted a quick *Daubert* hearing outside of the jury's presence. At the hearing, Plennes testified that he had worked for the DEA for 14 years, the last five in San Diego. His division's responsibility was limited to San Diego County, where he had worked with wiretaps, undercover agents, and cooperators. He testified that he had not

encountered any cases within his area of responsibility involving "people coming in on foot with drugs in backpacks." But he admitted that the San Ysidro office, not his office, "is assigned to more of the southern border." And because his experience did not involve border apprehensions, he had phoned a DEA agent from the San Ysidro office "in charge of sending people out, DEA agents out, to cover Border Patrol apprehensions." That agent said he had not seen any backpacking cases in the last five years. To further fill the gap in his personal experience, Plennes also spoke to a supervisory Border Patrol agent. The supervisory agent told him Border Patrol "had zero cases [involving backpack smuggling] in San Diego County within the past two years."

Plennes conceded that "Border Patrol is the first line along the border, so they're going to have all the statistics, as far as the backpackers." He confirmed that he had not reviewed any documents in preparation for his testimony. He claimed to have read periodicals about the issue of backpack smuggling, but couldn't remember which ones.

The district court recognized that Plennes was "not qualified, or at least the qualifications haven't been established for a broad scope of issues." The court also recognized that "his testimony indicates that most of his experience is in the San Diego sector, which would not necessarily extend all the way out as far as we're talking about, but that's a matter of weight for the jury to give his testimony." Ultimately ruling that Plennes could testify as an expert, the court explained, "He says he's checked with Border Patrol, who would, in the first instance, be the agency

that would encounter such people, that they are unaware of that happening with the last couple of years."

When the government called him to testify at trial, Plennes said he had never encountered a person bringing drugs across the border in a backpack. The prosecutor then asked, "Have you talked with Border Patrol to confirm that they haven't caught anybody with a backpack?" Plennes confirmed he had, and that Border Patrol had "conducted searches." "Were there any drug backpackers present?" asked the prosecutor, purportedly inquiring whether the unspecified "searches" had turned up relevant cases. Plennes responded, "No." The prosecutor then asked, "Do you have any opinion about whether drug backpackers are used as a manner of importation here at places other than ports of entry?" Plennes answered, "They may have been at one point, but we are not seeing any cases pertaining to drug backpackers in the San Diego area."

F. At closing argument, the government highlights the importance of Petitioner's testimony to his defense and attacks his credibility based on Plennes's testimony.

The prosecutor began her closing argument by recounting the details of Petitioner's arrest. But she quickly shifted to Petitioner's testimony and focused on the government's attempts to rebut it. She explained that "this case is a little unusual" because of Petitioner's affirmative defense of necessity. "And the evidence that you have for this [defense] is the defendant's own testimony." "And so in order to find that this [defense] has been met, you have to believe the defendant's testimony."

"But remember," she told the jury, "you also heard from DEA Agent Plennes, who's been here in San Diego for five years, investigating drug offenses. And he hasn't encountered anyone who's crossed drugs in a backpack." On rebuttal, she reminded the jury that Plennes "told you that we see—we don't see backpackers here."

G. The jury convicts Petitioner.

After closing argument, the district court instructed the jury on the elements of the offense and Petitioner's affirmative defense of necessity. The jury deliberated and convicted Petitioner.

H. The district court sentences Petitioner, who subsequently appeals his conviction

After rejecting Petitioner's motion for a new trial, the Court imposed a sentence of 33 months' imprisonment, followed by three years of supervised release. Petitioner timely appealed.

I. Appeal

Petitioner appealed his conviction to the Ninth Circuit, arguing, *inter alia*, that the district court had plainly erred in permitting Agent Plennes to testify about the supervisory Border Patrol Agent's out-of-court statements. Specifically, Petitioner contended that the Border Patrol Agent's statements were testimonial hearsay, prohibited under the Sixth Amendment.

A panel of the Ninth Circuit affirmed in a memorandum disposition. *See* Appendix A. The panel declined to reach the merits of Petitioner's claim, ruling that he had not proven prejudice under the plain error standard. The panel reasoned that

Petitioner "did not make a strong showing that his only viable option was to cross into the United States unlawfully." App'x A.

REASONS FOR GRANTING THE PETITION

This is the rare case where this Court should grant review for purposes of error correction. *See* S. Ct. R. 10. Here, the Ninth Circuit affirmed Petitioner's sentence despite the district court's plain error in admitting testimonial hearsay in violation of the Sixth Amendment. The Ninth Circuit erred in concluding that Petitioner failed to show prejudice, improperly requiring that Petitioner make a "strong showing" of his affirmative defense rather than proving it by a mere preponderance of the evidence. The Ninth Circuit consequently avoided confronting the plain constitutional error the district court committed: permitting a government expert to testify about the out-of-court statements of a law enforcement agent made in preparation for trial. This Court should grant certiorari and vacate the Ninth Circuit's erroneous disposition.

A. The District Court Erred by Admitting Testimonial Hearsay in Violation of the Sixth Amendment.

"Testimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Here, admission of the Border Patrol agent's statements through Plennes violated the Confrontation Clause of the Sixth Amendment, because the statements were testimonial hearsay and Petitioner had no opportunity to cross-examine.

In order for an expert to report out-of-court statements, the expert's testimony must contain "*some* level of independent judgment." *United States v. Gomez*, 725 F.3d 1121, 1130 (9th Cir. 2013) (emphasis in original); *see United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) ("The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay."). The expert's testimony may not be "merely repackaged testimonial hearsay," but rather a product of the expert's application of his expertise to the facts of the case. *See United States v. Vera*, 770 F.3d 1232, 1239 (9th Cir. 2014).

For example, in *Bullcoming v. New Mexico*, this Court clarified that drug analysts' sworn certifications are not admissible simply because an expert who did not prepare the certificate is available to discuss its results. 564 U.S. 647, 658-59 (2011). Such "surrogate testimony" is impermissible because the Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Id.* at 662. And "the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar." *Id.*

Here, the Border Patrol agent's statements about backpack cases to Agent Plennes should have been excluded from trial. Agent Plennes called the Border Patrol Agent the morning before he testified with the sole purpose of building evidence against Petitioner. Although the Border Patrol agent was presumably

available to testify himself (there was no indication otherwise), the government instead offered Plennes to tell the jury what the agent had said after running a search through Border Patrol databases. Plennes's testimony was thus the same "surrogate testimony" prohibited by *Bullcoming*: the agent's hearsay statements were the functional equivalent of his live testimony, but without facing Petitioner's cross-examination.

The admission of the agent's testimonial hearsay statements thus violated the Confrontation Clause. Plennes had no experience working border cases or backpacking cases, and his testimony that Border Patrol had not had any such cases was not an application of his personal knowledge, experience, and expertise. He might have been competent to testify about DEA's records, but the district court should not have permitted him "simply to parrot" the Border Patrol agent's out-of-court statements. *See Johnson*, 587 F.3d at 635.

The agent's statements about the searches he ran are akin to the drug lab certificates at issue in *Bullcoming*. There, the government's trial witness, although an expert in blood-alcohol analysis, had not performed the tests that were memorialized in another analyst's certified results. Thus, although he could talk about testing in general, the witness "could not convey what [the analyst who performed the test] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed." *Bullcoming*, 564 U.S. at 661. "Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Id.*

The same is true here. Plennes had not run the search of the Border Patrol database, so he was incompetent to testify about the search that the Border Patrol agent had performed. Nor could Petitioner uncover any shortcomings or falsehoods in the search results through cross-examination of Plennes, who hadn't conducted the search. In short, if the government wanted to introduce evidence about Border Patrol's databases, it needed to call the Border Patrol agent who searched them, not Plennes. Permitting the government to avoid confrontation of Border Patrol plainly violated the Sixth Amendment.

B. The district court's erroneous admission of testimonial hearsay prejudiced Petitioner's substantial rights.

The erroneous admission of testimonial hearsay statements prejudiced Petitioner's substantial rights. "An error affects substantial rights if there is 'a reasonable probability that the error affected the outcome of the trial.'" *United States v. Vazquez-Hernandez*, 849 F.3d 1219, 1227 (9th Cir. 2017) (quoting *United States v. Marcus*, 560 U.S. 258, 262 (2010)).

First, although the inadmissible hearsay statements were not the entirety of Plennes's testimony, they formed the most important part. As Plennes testified during the *Daubert* hearing—and as the district court recognized—Border Patrol, not DEA, was the agency in possession of the information relevant to Petitioner's defense. Without reporting what Border Patrol had found through its searches, Plennes's testimony would have been only marginally relevant and far less convincing.

Second, while a law enforcement agent's testimony always carries great weight with juries, Plennes's testimony at Petitioner's trial was particularly prejudicial. The prosecutor reminded the jury during closing argument that Petitioner's affirmative defense of necessity depended on the believability of Petitioner's testimony and the testimony of a defense expert, *both* of which were incredible if Plennes's expert testimony was accepted by the jury. *See United States v. Gadson*, 763 F.3d 1189, 1212 (9th Cir. 2014) ("witnesses who testify as an expert may receive unmerited credibility for their lay testimony, because expert testimony is likely to carry special weight with the jury" (quotation marks omitted)). In order to make out his claim of necessity, Petitioner had to concede that the government could prove each of the elements of § 1326. The *only* disputed issue at trial was whether his illegal entry was justified by what had happened before he crossed. In other words, Petitioner's entire defense depended on his ability to meet his burden rather than attacking the government's evidence.

At closing, the prosecutor seized on that reality and used Plennes's assertions to dismiss Petitioner's testimony *and* his defense expert. She argued, "[I]n order to find that [the defense of necessity] has been met, you have to believe the defendant's testimony." And she pointed out that Petitioner had attempted to corroborate his testimony with expert testimony about drug smuggling. "But remember," she argued, "you also heard from DEA Agent Plennes, who's been here in San Diego for five years, investigating drug offenses. And he hasn't encountered anyone who's crossed drugs in a backpack." She repeated the warning in rebuttal,

reminding the jury that Plennes "told you that we see—we don't see backpackers here."

In short, the weight of Plennes's testimony and the centrality of the testimonial hearsay to his expert opinion plainly caused prejudice to Petitioner's case. Without the government's reliance on that impermissible testimony, Petitioner easily would have met his burden of proving his necessity defense.

C. This court should grant review and correct the error in Petitioner's case.

Despite the district court's error, the Ninth Circuit panel affirmed the conviction. The panel declined to decide whether the district court had erred, instead erroneously ruling that Petitioner had not shown prejudice. *See* App'x A. This Court should correct the Ninth Circuit's error.

The Ninth Circuit panel fist claimed the "challenged statements had a minimal role" in the trial and were "largely repetitive" of permissible testimony. *See* App'x A. This is wrong. The prosecutor's decision to highlight the testimony during closing argument proves the centrality of the testimony to the jury's decision. And the testimonial hearsay was hardly repetitive. Although Plennes testified that both he and Border Patrol were unaware of forced backpack smuggling cases, he admitted that *only* Border Patrol would have direct knowledge of such cases. So the testimonial hearsay from the Border Patrol agent was the only assertion that carried any weight.

More importantly, the Ninth Circuit's analysis about the weight of the testimony was marred by imposition of the improper standard regarding the affirmative defense of necessity. The Ninth Circuit ruled that Petitioner "did not

make a *strong showing* that his only viable option was to cross into the United States unlawfully." App'x A (emphasis added). But no "strong showing" was required. Instead, as this Court has explained, a defendant need only prove his affirmative defense of necessity by a preponderance of the evidence. *See Dixon v. United States*, 548 U.S. 1, 8 (2006).

Under the lesser preponderance standard and a realistic assessment of the weight of the testimony, the Ninth Circuit should have ruled that Petitioner proved prejudice from the district court's constitutional error.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit's erroneous ruling.

Respectfully submitted,

Dated: January 15, 2020

s/ Michael Marks

MICHAEL MARKS
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Michael_Marks@fd.org

Attorneys for Petitioner