No. _____

IN THE
Supreme Court of the United States

JAIME MONZON-SILVA,
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

Doug Keller
Federal Defenders of San Diego, Inc.
225 Broadway Street, #900
San Diego, California 92101
619.234.8467
Doug_Keller@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Did the district court abuse its discretion by permitting a jury to hear evidence that Petitioner believed he was a "wanted fugitive," evidence that did not go to a contested element?

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The unpublished memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix. *See* Pet. App. 1a–3a.

JURISDICTION

The court of appeals entered judgment on January 27, 2020. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. On January 6, 2018, around 11:00 a.m., Petitioner was driving northbound on the Interstate 5 (north of San Diego, California) when he arrived at an immigration checkpoint. In the primary inspection area, Petitioner presented his California identification card to Border Patrol Agent Pedro Olvera. Agent Olvera observed that Petitioner had a birth certificate on the passenger seat. Finding this unusual, Agent Olvera referred Petitioner to secondary inspection.

In secondary, Petitioner provided his California identification card and birth certificate to Border Patrol Agent Andrew Dion. Petitioner consented to a search of his trunk. During the search, Border Patrol Agent Ala Abdelmuti approached the passenger side of Petitioner's car and asked him to turn off his ignition. As Agent Abdelumuti was saying this to Petitioner, a radio transmission came through stating that Petitioner "also has an alert for being a wanted fugitive from 2010."

Immediately after the "wanted fugitive" statement was made, Petitioner fled the secondary area and began driving north. Petitioner's quick flight from the checkpoint is caught on videotape.

Border Patrol agents, including Agent Jose Raya, pursued Petitioner northbound on the Interstate 5. Agent Raya caught up to Petitioner about two miles north of the checkpoint. Once he caught up to Petitioner, Agent Raya maintained a four to five car length's distance from Petitioner and looked at his own speedometer to gauge Petitioner's speed. Agent Raya reported to dispatch that Petitioner was traveling "about 70" and "still about 75." Less than a minute later, Agent Raya stated Petitioner was going 55 miles per hour. Agent Raya testified that while he was following Petitioner and trying to gauge his speed, he was also talking to dispatch, watching Petitioner's car, watching the road, paying attention to road conditions, and looking in his rearview mirror. A radar gun was not used to calculate the speeds. Agent Raya testified that he had not been trained on how to calculate speed without a radar gun, "not aside from just looking down at my speedometer." The posted speed limit on that stretch of the Interstate 5 is 65 miles per hour.

Agents performed a "boxing in" maneuver where three Border Patrol cars surrounded Petitioner's car so that it came to a stop. Petitioner was arrested and taken back to the border patrol station, where agents learned that the radio transmission about Petitioner being a "wanted fugitive" was incorrect.

2. Petitioner was indicted for high-speed flight from an immigration checkpoint in violation of 18 U.S.C. § 758. An individual violates that statute if he or she "flees or evades a checkpoint operated by the Immigration and Naturalization Service, or any other Federal law enforcement agency, in a motor vehicle and flees Federal, State, or local law enforcement agents in excess of the legal speed limit[.]" 18 U.S.C. § 758.

Before trial, Petitioner moved to exclude the radio transmission that he was a "wanted fugitive from 2010." Petitioner argued that the radio transmission's probative value was substantially outweighed by the danger of undue prejudice and should be excluded pursuant to Federal Rule of Evidence 403. He argued that the statement was highly inflammatory because jurors could speculate that he was wanted for serious crimes like murder or rape. Its probative value was minimal as it did not relate to any element of the offense and both parties agreed that Petitioner was not in fact a wanted fugitive. While Petitioner did have a warrant back in 2010, that warrant was not active on the date of arrest.

At the motions in limine hearing, the district court found that the radio transmission was relevant because "motive evidence is always relevant" and that Petitioner's motive to flee the checkpoint may have been because he overheard the transmission. The court then stated that the "only question is whether there's a 403 danger that can't be mitigated by instructions or otherwise."

Defense counsel expressed concern that any explanation of why the misinformation was broadcast over the radio, or any confirmation that Petitioner did in fact have a warrant in 2010, would be extremely prejudicial. The district court recognized these concerns and made clear that the transmission would only be admissible to show motive and that no further explanation about the transmission would be permitted:

> We're not going to go any deeper into it [ ], than to say this is what was broadcast. We concede that this was incorrect at the time. It was a good faith mistake, but it was a mistake.

3. At trial, Petitioner contested only one element of the offense—whether he fled in excess of the 65 miles per hour speed limit. The government's case consisted of the testimony of four Border Patrol agents and a California Highway Patrol officer. Three out of the four agents testified about the "wanted fugitive" radio transmission.

Agent Olvera, the primary officer, testified that after he sent Petitioner to secondary, he heard "something on the radio about a – a wanted fugitive" and that soon after, he heard tires peeling out and saw Petitioner fleeing from the checkpoint.

The government's next witness, Agent Dion, testified about his interactions with Petitioner in secondary. During the government's direct examination of Agent Dion, the following exchange took place:

> Prosecutor: And did you learn about the identity of the defendant at some point?

> Witness: Yes.
>
> Prosecutor: Okay. Did you hear anything over the radio about him at some point?
>
> Witness: Yes.
>
> Prosecutor: Okay. What did you hear over the radio?
>
> Defense counsel: Objection, your honor, hearsay.
>
> Court: Overruled.
>
> Witness: I heard that he had some criminal history and also that he was a wanted fugitive in [2010]. It was a while ago.
>
> Defense counsel: Your Honor, I would object. Could we have a brief sidebar?

At sidebar, before defense counsel could explain her objection, the court immediately acknowledged the witness's problematic reference to criminal history. Defense counsel moved for a mistrial, noting that the comment was "extremely prejudicial." The court responded that it would instruct the jury to disregard "that part" and provided the following instruction to the jury:

> Ladies and gentlemen, the witness mentioned "criminal history." You should disregard that. That – that should not enter into your deliberations at all. He – he said what he heard was something about a wanted fugitive and criminal history. Disregard the comment about criminal history.
>
> Can all of you do that? Can all of you assure me that that will not enter into your thinking whatsoever in deciding this case?

The jurors nodded their heads in response, and the court denied the mistrial motion.

After the government's direct examination of Agent Dion, the parties entered a stipulation into the record regarding the "wanted fugitive" radio transmission. That stipulation stated that the parties "agree that the statement is not factually accurate. On January 16th, 2018, Petitioner was not a wanted fugitive and did not have any active warrants."

The government's final witness, Agent Abdelmuti, testified that he heard the "wanted fugitive" radio transmission as he was telling Petitioner to turn off his ignition in the secondary inspection area. The agent testified, "as soon as [Petitioner] heard that transmission, he put the vehicle in drive and took off." After the government's direct examination was complete, the court provided the following limiting instruction about Agent Abdelmuti's testimony regarding the radio transmission:

> You should consider this testimony about the radio transmission that was just testified to only in this regard: Whether it was heard by the defendant and whether that supplied him a motive for him to leave the checkpoint. It's only relevant for that purpose, no other purpose. You've heard a stipulation between the parties that it turned out the information was erroneous. So you consider it only for that purpose.

This was the only time the court provided a limiting instruction on how the jury can consider the radio transmission testimony.

The jury ultimately returned a verdict of guilty.

4. On appeal, Petitioner argued that the district court abused its discretion by allowing the jury to hear the radio transmission that he was a "wanted fugitive." Petitioner argued the court should have excluded the evidence under

Federal Rule of Evidence 403. He explained that the probativeness of the evidence was low. The transmission was merely relevant to his motive for fleeing—but motive is not an element of the offense and there was no dispute that he had fled. The only issue before the jury was whether he fled in excess of the speed limit. On the other hand, the evidence was incredibly unfairly prejudicial. It is true the jury was told that he was not, in fact, a wanted fugitive. But the evidence still established that Petitioner was the sort of person who would *believe* he was a wanted fugitive. That could have led the jury to assume he was a dangerous person who deserved to be locked up, even if he didn't actually speed away at more than 65 miles per hour.

5. The court of appeals affirmed. In doing so, the court held that the "radio transmission was at the very least relevant to [Petitioner's] motive for fleeing the checkpoint." Pet. App. 2a. On the other hand, the court claimed "[a]ny potential prejudice . . . was effectively mitigated by the parties stipulation on the record that [Petitioner] was not, in fact, a wanted fugitive," as well as the fact that the court told the jury to consider the evidence only as evidence of motive. Pet. App. 2a. The court further held that the, even if there was error, it was harmless, because there was "ample evidence showing that [Petitioner] fled the checkpoint at a speed in excess of the legal speed limit[.]" Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

Federal Rule of Evidence 403 allow district courts to exclude relevant evidence if its probative value is outweighed by the danger of unfair prejudice. A district court's erroneous admission of such evidence, particularly if it's an inflammatory reference related to the defendant's criminal nature, may cause the jury to reach a guilty verdict based on emotions rather than on the evidence. This is especially true in a case that is close, where the government's evidence of guilt is minimal and uncorroborated. In a close case, even the slightest prejudicial piece of evidence can tip the scale to a guilty verdict. This is such a case. As explained in more detail below, the court of appeals fails to recognized that. Given the fundamental nature of the lower court's error, this is the rare case in which this Court should grant review for error-correction purposes.

1. Federal Rule of Evidence 403 provides that otherwise relevant evidence is excludable when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Although trial courts have "wide latitude in making Rule 403 decisions," it is "not unlimited." *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). Where the evidence is of marginal probative value, it is an abuse of discretion to admit it "if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury." *Id.* Here, the false radio transmission was of marginal probative value.

And because there was at least a modest likelihood of unfair prejudice, the court should have excluded the evidence under 403.

The radio transmission was of minimal probative value. When evidence does not go to an element of the charged offense, the probative value of the evidence is low. *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005) (finding that a "mere detail in the story of the offense" that does not go to any of the elements carries low probative value). The district court found that the only reason the transmission was relevant was to show motive. Motive is not an element of the offense. At best, motive only tangentially relates to two of the five elements – it potentially explains *why* Petitioner fled the checkpoint and *why* he fled from law enforcement officers.

Further minimizing the probative value is the fact that the defense did not contest the two elements related to fleeing. Indeed, it was uncontestable that Petitioner fled. Video recordings of the secondary inspection area and the pursuit northbound on the freeway established beyond dispute that Petitioner fled the checkpoint and law enforcement agents. That's why the defense theory was that the government could not prove beyond a reasonable doubt that Petitioner fled in excess of the speed limit. Because the defense was not contesting the fact that Petitioner fled, the radio transmission explaining why he fled is only minimally probative.

On the other side of the Rule 403 balancing test, the false "wanted fugitive" radio transmission presented a serious danger of unfair prejudice. "Unfair

prejudice" refers to "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's notes. This Court has described unfair prejudice as evidence that "lure[s] the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). "Evidence is unfairly prejudicial if it makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged." *United States v. Yazzie*, 59 F.3d 807, 811 (9th Cir. 1995) (emphasis removed) (internal quotation marks omitted).

The fact that the radio transmission used the term "wanted fugitive" automatically resulted in unfair prejudice given the close association of "fugitive" with terms used in the charge, including "flight" and "fled." The first definition of "fugitive" in Black's Law Dictionary is "someone who flees or escapes." *Fugitive, Black's Law Dictionary* (10th ed. 2013). Not only does the term "wanted fugitive" evoke the image of a person fleeing, it evokes the image of a *dangerous* person fleeing *at any cost* to avoid detection by law enforcement. A Google search of "wanted fugitive" produces numerous links to the FBI's Ten Most Wanted bulletins, where nearly all fugitives are suspected of murder. Calling a person a "wanted fugitive" is a loaded descriptor and causes a visceral reaction that the person is dangerous, violent, and a sophisticated criminal.

When the jury heard that Petitioner was a "wanted fugitive," they would have concluded not only that Petitioner was the sort of person who would flee, but that he would do anything necessary to successfully flee, including driving at a high speed from the checkpoint. Additionally, given the visceral reaction that people have upon hearing the word "fugitive" – as defense counsel pointed out, it could make jurors think he was wanted for murder or rape – the jury may have concluded that Petitioner was so dangerous that he should be incarcerated, whether he actually committed this offense or not.

The district court attempted to remove any unfair prejudice from the false "wanted fugitive" radio transmission by offering a limiting instruction. While a timely limiting instruction from the court can typically "cure[ ] the prejudicial impact of evidence," the instruction may not be sufficient when (1) the instruction is "clearly inadequate," or (2) the evidence is "highly prejudicial." *United States v. Merino-Balderrama*, 146 F.3d 758, 764 (9th Cir. 1998). Here, the instruction was not timely, it was clearly inadequate, and the evidence it related to was highly prejudicial.

The government called three witnesses who testified about the "wanted fugitive" radio transmission – Agents Olvera, Dion, and Abdelmuti. All three witnesses testified that soon after the transmission was made, Petitioner fled the checkpoint. But the court's limiting instruction about how to consider this evidence

was not made until *after* the government's last witness, Agent Abdelmuti, had testified. The instruction was therefore untimely.

The instruction was also inadequate. After Agent Abdelmuti testified about the transmission, the court said:

> You should consider this testimony about the radio transmission ***that was just testified to*** only in this regard: Whether it was heard by the defendant and whether that supplied him a motive for him to leave the checkpoint. It's only relevant for that purpose, no other purpose. You've heard a stipulation between the parties that it turned out the information was erroneous. So you consider it only for that purpose.

(emphasis added). By using the phrase "that was *just* testified to," the court essentially limited the application of its instruction only to Agent Abdelmuti's testimony of the "wanted fugitive" radio transmission. And because the district court said that the limiting instruction applied only to the testimony of Agent Abdelmuti, the court neglected to provide any instructions as it relates to the testimony of Agents Olvera and Dion. Recognizing that this Court has held that juries are presumed to follow their instructions, if the jury did so here, it would have impermissibly used the evidence of the radio transmission as testified by Agents Olvera and Dion for non-motive purposes. This is particularly problematic since Agent Dion also referenced Petitioner's criminal history while explaining the radio transmission. Put another way, when Agents Olvera and Dion testified, the jury could have interpreted the "wanted fugitive" transmission as evidence of criminal propensity and nothing in the court's instructions would have remedied that.

In fact, the court's instruction regarding motive exacerbated the prejudice by undercutting any benefit created by the parties' stipulation that the transmission was inaccurate. Though the parties agreed that Petitioner was not a wanted fugitive on the date of arrest, by telling the jury that they could consider the transmission for motive, the court implicitly suggested that Petitioner believed himself to have been a wanted fugitive. The only person who would be motivated to flee after hearing a "wanted fugitive" radio transmission is someone who *actually believes* he is in fact a wanted fugitive, either because he knows he has an active warrant or because he believes he may have a warrant based on his criminal behavior. In other words, even accepting that the transmission is inaccurate, the admission of the transmission itself for the purpose of motive indicates to the jury that Petitioner is someone who thought of himself as a wanted fugitive. The jury therefore likely found him guilty on the improper basis that he has criminal tendencies in light of his reaction to hearing that he was a fugitive.

2. In affirming, the court of appeals held that "any potential prejudice here was effectively mitigated by the parties' stipulation on the record that [Petitioner] was not, in fact a wanted fugitive, testimony from two witnesses indicating the same, and the district court's limiting instruction that the transmission was relevant only for assessing motive." Pet. App. 2a.

But that just entirely ignores Petitioner's argument. It doesn't address the fact that the jury knew that Petitioner was the type of person who would believe he

was a wanted fugitive (even if it wasn't true). And it doesn't address the shortcomings of the court's limiting instruction.

3. The court of appeals also held that any error was harmless because of the "ample evidence showing that [Petitioner] fled the checkpoint at a speed in excess of the legal speed limit—the only contested issue at trial[.]" Pet. App. 2.

First, erroneously admitting the radio transmission likely affected the jury's verdict because the only issue at trial was whether Petitioner exceeded the 65 miles per hour speed limit, and the government's evidence supporting that he had was minimal. The only testimony presented at trial regarding Petitioner's speed came from Agent Raya. The government played the radio dispatch tape where Agent Raya, in pursuit of Petitioner, stated that Petitioner was driving "about 70" and "still about 75" miles per hour. The fact that Agent Raya used the word "about" when referencing the speed emphasized that these numbers were estimates and not certainties. And there was no evidence corroborating Agent Raya's measurements of speed. A radar gun was not used. No other witness testified about Petitioner's speed. Agent Raya admitted that he does not have training on how to gauge speed without a radar gun other than merely looking at his speedometer. Agent Raya also testified that trying to gauge Petitioner's speed was not the only thing he was focused on – he was simultaneously talking to dispatch, watching other traffic, and paying attention to road conditions. This was not a case where Petitioner was speeding at 100 miles per hour or some exceedingly high speed. The estimated

speeds Agent Raya reported were *only* five and ten miles per hour above the posted 65 miles per hour speed limit. Given the absence of evidence corroborating Agent Raya's testimony, it is more probable than not that the jury convicted Petitioner because the inflammatory reference to him being a "wanted fugitive" led the jury to believe that he was a dangerous person who would flee at any cost, including at high speeds.

Second, as previously discussed, the district court's limiting instruction did not cure the substantial prejudice, particularly because the instruction did not reference the testimony of Agents Olvera and Dion. An instruction itself is not a "sure-fire panacea" for the harm done by the improper admission of prejudicial evidence. In fact, social science research show that jurors do *not* follow limiting instructions related to prior bad acts, which is akin to the limiting instruction at issue here, and that such instruction can make jurors more likely to draw an impermissible inference. *See* Joel Lieberman and Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 Psychol. Pub. Pol'y & L. 677, 685-701 (2000). With an inadequate and likely ineffective instruction, the jury was exposed to the full impact of the prejudicial and false radio transmission and likely used it as evidence of Petitioner being a dangerous criminal who should be incarcerated.

Because the radio transmission was inadmissible under Rule 403, and the flawed jury instruction provided no adequate remedy for that error, the radio transmission should not have been admitted. Under these circumstances, the

government cannot meet its burden to show harmlessness. Admission of the "wanted fugitive" radio transmission more probably than not affected the verdict by tipping the scales and encouraging the jury to err on the side of convicting Petitioner rather than seeing someone who perceived himself as a "wanted fugitive" go free.

* * *

In sum, the court of appeals erred when it affirmed Petitioner's conviction, and Petitioner asks that this Court grant review in this case for the purposes of correcting that error. This is the rare case in which this Court should grant review for purposes of error correction.

CONCLUSION

The petition for a writ of certiorari should be granted.

February 26, 2018

Respectfully submitted,

Doug Keller

Appendix

NOT FOR PUBLICATION

FILED

JAN 27 2020

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAIME MONZON-SILVA, Defendant-Appellant.	No. 18-50382 D.C. No. 3:18-cr-01804-LAB-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Submitted January 22, 2020**
Pasadena, California

Before: RAWLINSON, LEE, and BRESS, Circuit Judges.

On January 16, 2018, and while driving northbound, Monzon-Silva was ordered to proceed through secondary inspection at the San Clemente Border Patrol checkpoint. As an agent began the inspection, a transmission on the agent's radio audibly reported that Monzon-Silva was a "wanted fugitive." Immediately after that

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

transmission aired, Monzon-Silva fled the checkpoint. After a jury trial, he was convicted of high-speed flight from an immigration checkpoint, 18 U.S.C. § 758, which resulted in a sentence of five years of probation. We affirm.

1. The district court did not err in allowing the radio transmission into evidence. The radio transmission was at the very least relevant to Monzon-Silva's motive for fleeing the checkpoint. *See* Fed. R. Evid. 401; *United States v. Bradshaw*, 690 F.2d 704, 708 (9th Cir. 1982). We reject Monzon-Silva's argument that the probative value of the radio transmission was "substantially outweighed" by its "unfair prejudice." Fed. R. Evid. 403. Exclusion of otherwise relevant evidence under Rule 403 is "an extraordinary remedy to be used sparingly," *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995) (quotation omitted), and we review the district court's evidentiary ruling for abuse of discretion, *United States v. Lindsay*, 931 F.3d 852, 859 (9th Cir. 2019). Any potential prejudice here was effectively mitigated by the parties' stipulation on the record that Monzon-Silva was not, in fact, a wanted fugitive, testimony from two witnesses indicating the same, and the district court's limiting instruction that the transmission was relevant only for assessing motive. Moreover, given the ample evidence showing that Monzon-Silva fled the checkpoint at a speed in excess of the legal speed limit—the only contested issue at trial—any error would have been harmless. *See, e.g.*, *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1099 (9th Cir. 2005).

2. Monzon-Silva next argues that the district court erred in denying his motion for mistrial after one officer briefly testified that the radio transmission suggested Monzon-Silva had "some criminal history." We review a district court's denial of a motion for mistrial for abuse of discretion. *See United States v. Audette*, 923 F.3d 1227, 1241 (9th Cir. 2019). When Monzon-Silva's counsel objected to the testimony, the court sustained the objection, struck the testimony, promptly instructed the jurors to disregard it, confirmed with the jurors that they would do so, and repeated the admonition during the final instructions. Under these circumstances, the district court did not abuse its discretion in denying Monzon-Silva's motion for mistrial.

3. Because we do not find any error in the district court's rulings, we must reject Monzon-Silva's argument that the district court's alleged cumulative errors deprived him of a fair trial. *United States v. Martinez-Martinez*, 369 F.3d 1076, 1090 (9th Cir. 2004) ("[T]he 'cumulative error' analysis is inapposite to this case. Defendant has failed to demonstrate any erroneous decisions by the trial court.").

AFFIRMED.