

**IN THE  
SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2020**

No. \_\_\_\_\_

MARIA PENA-RIVERA,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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*in forma pauperis*

### **QUESTION PRESENTED**

Is it error by the district court to fail to enumerate the specific basis for allowing evidence pursuant for Federal Rule of Evidence section 404(b) such that it can properly be analyzed pursuant to the required review under Federal Rule of Evidence 403.

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The petitioner, MARIA PENA-RIVERA, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered after refusing a petition for rehearing and

petition for rehearing *en banc* on June 15, 2020

### **OPINION BELOW**

On May 7, 2020, the Court of Appeals rejected petitioner's arguments in the above-entitled case which is not published. On June 15, 2020 the panel rejected a petition for rehearing and petition for rehearing *en banc* .(See Appendix A).

### **JURISDICTION**

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13 subsections(1)and (3).

### **PROVISIONS OF LAW INVOLVED**

The Federal Rules of Evidence 403 and 404(b).

### **STATEMENT OF THE CASE**

#### **A. Proceedings and Disposition in the District Court:**

On August 31, 2017, a complaint was filed against Ms. PENA in the Southern District of California, charging her with importation of methamphetamine and cocaine. 21 U.S.C. §§ 952 and 960. [CR 1, ER 128]. The case went to trial twice on the allegations in the original complaint. Factually, this was a classic border arrest. Other than the typical border bust evidence; i.e. what was found in the car, the street value of the contraband and the type of drugs

involved; the bulk of the evidence consisted of the government's attempt to provide circumstantial evidence as to the knowledge by the defendant that she knew what was in the car. The defense case consisted of providing the innocent explanations for the government's circumstantial claims.

The prosecution provided a variety basis in attempting to meet all the elements of the offense on the part of Ms. PENA. There was, of course, types and quantity of drugs shown to the jury, over objection from the defense, along with an expert on the value of the drugs [Opp to gov's limine motions C.R. 35, ER 131]; expert testimony on how the compartment was built in the Volkswagen Jetta; and the history of border crossings by Ms. PENA.

Additionally, over objection [ER 368], the prosecution entered into evidence four-month-old text conversations from Ms. PENA's phone along with the case agent's opinion that the messages concerned "bulk cash smuggling of money." [ER 376-77]. The government in closing went into this testimony. [ER 665-667].

Notably missing was any evidence of nervousness by Ms. PENA at the time of her questioning by border patrol personnel [ER 32]. In fact, Ms. PENA was "sassy" when providing biographical information. [ER 33]. Her initial statements to border patrol officer was accurate and true. She provided her valid

identification. She said she was going home to San Ysidro, which is where she lives. She was asked to open her trunk, which she did. [ER 29-31].

Moreover, elicited on cross examinations, was evidence that on previous occasions, within days of Ms. PENA's arrest she had been repeatedly sent to secondary inspection and subject to lengthy searches including x-rays of her car, canine searches and . [ER 41]. This was because previously border patrol agents had found the non-factory compartment in Ms. PENA's car. They never told her about the compartment, but rather put an "alert" in the border patrol's computer systems and sent Ms. PENA on her way. [ER 35-36, 37-39, 48, 81-88].

Finally, testimony was elicited that the name of a person who Ms. PENA suspected to have placed the drugs unknowingly into her car, Gerardo Medina, who had been found to have been present in another Volkswagen Jetta, eventually linked to a drug importation. [ER 71-75, 78-79 sidebar conference denying the right to go into the issue, 89-92].

## **B. Statement of Facts Relevant to this Petition.**

### **1. The Offense:**

Appellant/defendant MARIA PENA-RIVERA was charged with 21 U.S.C. § 952 and § 960 (importation of methamphetamine and cocaine).

### **C. Reasons for Granting the Writ.**

Courts continue to allow suspect evidence to go before the jury. There is a tendency to conflate all the basis contained in Federal Rule of Evidence 404(b) in order to allow untrustworthy information into evidence. By conflating the bases under 404(b), there is a failure to then conduct the required prejudice analysis by balancing the relevancy of the particular part of 404(b) to its potential prejudice.

In this case, the Court allowed months old text messages from Ms. PENA's phone into evidence that, according to the Court:

THE COURT:

It sounds like from the conversation that she has a very large amount of money that belongs to someone that's down in Mexico that she couldn't take off with it because she wouldn't make it out alive. She joked she could come here. "We'll put a barrier up around Jalisco." She says, "The owner of the money is down there." That certainly sounds like ties to a drug organization, which makes it a little more relevant than just bringing money across.

[E.R. 15].

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THE COURT: Well, I think it also goes to whether she is connected to drug traffickers and knew what she was bringing in were drugs. And this shows sort of an opportunity, she has the opportunity to bring drugs in.

[E.R. 16]

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THE COURT: As I said, I think that the relevance goes to the fact that she's -- at least the government can make the argument that she's connected to drug traffickers, that she knows drug traffickers, that she's doing something for them four months before, that she has the opportunity to smuggle drugs, that she has the intent to work for them, and that there's a preparation, plan, and knowledge. I think it goes to all of those things, and I think that's really the key issue in

[E.R. 17-18] .

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THE COURT: 404(b) is you can't put in crimes to show someone's a bad person, and that's not why they're



putting it in. They're not putting it in to say gosh, let's tarnish her reputation by showing she's a bad person. It has to go to something specific in this case, and in this case, it is going to something specific. It's going to the fact that she has the opportunity to smuggle drugs for someone and that she has the knowledge that she's smuggling drugs for someone.

So I find, first of all, that it does go to those things, and so it's admissible under 404(b), and under 403, I find the relevance outweighs any prejudice or undue prejudice, and I find that there was reasonable notice given to the defense.

So I will allow the Zarai conversation.

[E.R. 17-18] .

The problem is that the evidence was put in to “tarnish her reputation by showing she's a bad person.” This was especially exacerbated by the allowance of improper opinion evidence by the Court from the case agent, lacking foundation, that this cryptic conversation was one about “the bulk cash smuggling of money.” [E.R. 057]. It should be noted there were no charges of money laundering or cash

smuggling in the complaint filed against Ms. PENA. [E.R. 123-26].

The Court has adopted a four-part test to determine the admissibility of evidence under Rule 404(b). *See United States v. Basinger*, 60 F.3d 1400, 1407-08 (9th Cir. 1995). First, the evidence of other crimes must tend to prove a material issue in the case. Second, the other crime must be similar to the offense charged. Third, proof of the other crime must be based on sufficient evidence. Fourth, commission of the other crime must not be too remote in time. *Id.* In addition to satisfying the four-part test, evidence of other crimes must also satisfy the Rule 403 balancing test - its probative value must not be substantially outweighed by the danger of unfair prejudice. *See Fed. R. Evid. 403.* The Government has the burden of demonstrating that the evidence of other crimes satisfies these requirements. *See, United States v. Arambula-Ruiz*, 987 F.2d 599, 602-03 (9th Cir. 1993). *United States v. Montgomery*, 150 F.3d 983, 1000-01 (9<sup>th</sup> Cir. 1998).

The evidence allowed in from the text messages fail several of the tests set forth by this Court. First, the argument that the text messages show bulk cash transfers as opined by the case agent, doesn't go to any issue in the case. This was a pure knowledge case. At best the probative value is minimal and should have been excluded pursuant to Fed. R. of Evid. 403. This Court has found the analysis under Rule 403 particularly important in the Rule 403 context. *See, United States*

*v. Cruz-Garcia*, 344 F.3d 951, 956 n. 4 (9<sup>th</sup> Cir. 2003); *United States v. Hill*, 953 F.2d 452, 457-458 (9<sup>th</sup> Cir. 1991).

Since the Court failed to articulate the exact relevancy basis other than rattling off several potential relevancies, it was impossible to conduct the proper balancing as to each articulated relevancy.

Second, the text is not similar to the charged conduct. The opinion from the case agent was that this represented cash transactions. The only charge against Ms. PENA was for drug importation. [E.R. 123-126]. Third, the opinion, allowed over objection, that the text messages represented cash transactions was speculation. There were no texts before or after during the four months until when the arrest of Ms. PENA that corroborated such an opinion.

Thus, this evidence had low probative value, but coupled with the opinion of the case agent served the purpose of painting Ms. PENA as a bad person and was therefore substantially prejudicial and should have been excluded.

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CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the Petition for Certiorari should be granted.

Respectfully submitted,

DATED: June 23, 2020



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