No. _____

IN THE
Supreme Court of the United States

GILBERTO MARTINEZ-HERNANDEZ,
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

Whether the court of appeals committed clear error by concluding that significant evidentiary errors were harmless.

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The unpublished memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix.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 July 2, 2020. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Petitioner was born in 1961 in Mexico. As a child, he immigrated with his family to the United States. Petitioner became a legal permanent resident. He married and settled in California. In 2011, after two decades of marriage, Petitioner's wife passed away. About five years later, he returned to Mexico to live with his parents.

This case arises out of Petitioner's arrest on November 8, 2017. Early that morning, Petitioner drove alone from Mexico to the Otay Mesa Port of Entry in a 2002 Ford Ranger. ER44, 52.[1] Petitioner had bought the truck three to five months earlier. *See* ER240. In the bed of the truck was painting tools and paint buckets. ER351–52. Over the past two months, Petitioner had driven almost daily into the United States in the truck during the morning hours. ER259–62.

On this day, as Petitioner pulled up to a primary inspection booth at the port, Officer Alan Magallanes walked by the truck with a drug-sniffing dog. ER45–52.

[1] "ER" refers to the Excerpts of Record filed in the court of appeals.

The dog "altert[ed]" to the truck's front fender area. ER52. Officer Magallanes told the officer in the booth—Officer Bryan Hobbs—that the dog had alerted to the truck's battery. ER54. Officer Magallanes told Officer Hobbs to send the truck to the secondary inspection area. ER54.

In secondary, Officer Henry Garcia inspected the truck's battery. ER119. He opened the top of the battery casing and found that the battery itself had been hollowed out, so only the casing remained. ER102. Inside the casing, Officer Garcia found four packages of about four kilograms of cocaine. *See* ER102–03, 133. He also found a lithium battery inside the casing that powered the truck. ER176–77.

After Officer Garcia uncovered the cocaine, he frisked Petitioner and found $2,283 in cash. ER105. Petitioner explained that he earned the cash in his job as a painter. ER4.

The government later charged Petitioner with one count of knowingly importing four kilograms of cocaine in violation of 21 U.S.C. §§ 952, 960. ER1. Petitioner pleaded not guilty.

2. Before trial, the prosecutor asked the court to rule on the admissibility of the approximately $2,300 in cash found on Petitioner. *See* ER12–13. In its motion, the government offered a single theory of relevancy: that the cash impeached Petitioner's post-arrest statement. ER12–13. The prosecutor claimed that Petitioner had told agents post-arrest that he had "paid the rough equivalent of $11 in Mexican pesos to a stranger for a car battery[.]" ER12. The prosecutor claimed, without explanation, that the large amount of money on Petitioner

contradicted his claim that he had bought a truck battery for only $11. ER12. The prosecutor claimed that this proved that Petitioner lied post-arrest and that the lie suggested consciousness of guilt. ER12.

In response, defense counsel argued that the court should exclude the cash as irrelevant under Federal Rule of Evidence 401 and unfairly prejudicial under Federal Rule of Evidence 403. ER22–25. Counsel argued that "[a] person can have two thousand dollars and yet still spend frugally on car parts." ER24.

At the next hearing, before the prosecutor could defend his view of the cash's admissibility, the court suggested a new theory of relevance: that a juror could properly view the cash as evidence of "payment for the importation" of the cocaine in the truck. ER36. Even though the prosecutor had not suggested that the cash was prepayment in his motion, he abandoned his impeachment-theory of relevance and embraced the court's view:

> Your Honor, I was just talking with one of my colleagues about that. I think in terms of the cash, you're absolutely right that the government should be able to argue the inference that this is payment for the drugs he's bringing across.

ER36. The court then held that the cash was admissible. According to the court, the prosecutor could "make the argument that that was his payment for bringing the drugs across." ER37.

Defense counsel asked the court to reconsider. Counsel noted that drug couriers are "paid after delivery, not before," and counsel asked the court to take judicial notice of that fact. ER37. The court refused to do so, saying she has "no idea

what drug traffickers do." ER38. The prosecutor, during this time, stood silent. The court then reiterated that the evidence about the cash was relevant (under Rule 401) and that its probative value did not substantially outweigh its unfair prejudice (under Rule 403). ER38.

The parties also debated whether the government could introduce expert testimony about cocaine's wholesale and retail price in San Diego. The prosecutor contended the cocaine's value was "circumstantial evidence of Defendant's knowledge of the drugs that [were] hidden in his vehicle." ER7. Defense counsel argued that the evidence was inadmissible under Rule 401 and Rule 403. ER15. Counsel focused in particular on the inappropriateness in an importation case (as compared with an intent-to-distribute case) of introducing retail price:

> Describing for the jury the increase in price of a brick of cocaine as it is broken down into smaller units for distribution does not but paint a picture for the jury of nefarious drug dealers in the jurors' own communities and then hang that picture around Petitioner's neck with no evidence linking him to it.

ER15.

The court found evidence about the wholesale and retail price of cocaine admissible: "I think given the fact that knowledge is a key element and that the only way to prove knowledge is via circumstantial evidence that the value of the drugs once it comes across the border, once it's sold is relevant on the issue of knowledge, so I will allow it, and I do find the probative value outweighs the prejudice." ER28.

At the hearing, the court also suppressed Petitioner's post-arrest statement. ER38.

3. At trial, the parties focused on whether the government could prove beyond a reasonable doubt that Petitioner knew about the cocaine in his truck's battery. Petitioner's theory of defense was that the cocaine was a so-called "lost load": that the truck had been used to smuggle drugs before he bought it, and, the drug trafficker, in unloading the drugs hidden throughout the truck, left the cocaine in the battery, either because of negligence or for some other reason.

Officer Magallanes, Officer Hobbs, and Officer Garcia all testified. Each explained their interactions with Petitioner, including that Petitioner was arrested with nearly $2,300 in cash, "mostly $20 bills." *See* ER105.

Officer Magallanes also claimed that, when he opened the truck's hood, Petitioner said that he had replaced the truck's battery either the day before or two days ago. ER54. Officer Magallanes claimed that he remembered "every detail" of their interaction five months later because it was the first time he had found drugs in a battery with a drug-sniffing dog. ER56. But on cross-examination, Officer Magallanes struggled to remember any other detail about Petitioner on the day of his arrest, including what Petitioner wore, what color his pants were, if he was wearing glasses, what car was in front of him, or what color car was behind him. ER66.

Agent Andrew Flood testified about the value of the cocaine in the truck. He explained to the jury that he had extensive experience with cocaine, including

buying cocaine in "the streets of San Diego." ER283. Agent Flood testified that the wholesale value of the four kilograms of cocaine seized was at least $72,000 in San Diego in November 2017. ER288. The retail value of the cocaine seized was at least $98,560 in San Diego in November 2017. ER288. Agent Flood also testified about the price of a single "dosage" and the price difference of a single dosage in San Diego as compared with Mexico. ER289. In doing so, Agent Flood discussed how much cocaine you could buy for $20. ER289. Finally, Agent Flood confirmed that he had seen cases involving much larger quantities of drugs at the port of entry than the four kilograms of cocaine involved in this case. ER293.

The government also introduced two jail calls from when Petitioner was in pretrial custody. ER228–29. During the calls with an unidentified friend, Petitioner referred to himself as a car mechanic. ER415. He also repeatedly referenced the cash that he possessed when he was arrested and how he wanted it back. ER415–17, 422–23.

As far as the ownership of the truck, the government established that Encinitas Glass Company owned the truck starting in 2004. ER223–26. According to Ronald Bub III, whose father owned the company, his father sold the truck in 2015 to a neighbor of Encinitas Glass: Leucadia Towing, owned by Joseph Radick. ER227, 234.

Mr. Radick testified and had a different memory of the timeline. According to Mr. Radick, he bought the truck in February or March 2017, not in 2015 like Mr. Bub had claimed. ER236. The truck had been on his lot, however, since 2015.

ER248. Mr. Radick testified that, when he bought it, he did not think the vehicle ran. ER237.

Mr. Radick sold the truck in June or July 2017 to an associate of a customer. ER240–42. He did not know the individual he sold the truck to, but knew that the person "was Mexican, Hispanic[.]" ER242. It is not clear whether that person was Petitioner or whether that individual later sold the truck to Petitioner. In any event, it was undisputed that by August 2017, Petitioner had bought the truck. *See* ER261–62.

Both sides also had an automotive-expert testify. John Louie testified for the government. He explained to the jury that the truck's battery casing was not for the factory-installed battery. ER172–73. He also discussed the significant rust built up on the bolts holding the battery in place. He estimated the rust would have taken "over a year" to develop naturally. ER184, 217. He affirmed that there were no "tool markings" on the rust on the bolts. ER184, 216. That meant that no one had opened the battery since the rust developed. ER184, 216. He noted, however, that you can accelerate the growth of rust "unnaturally" by "introducing salt or acid." ER220. He further noted that at least one bolt had more rust on its top side than its bottom side—Mr. Louie said that he believed that the rust should have formed at the same rate. ER221.

The defense's automotive expert was Mike Magers, an expert who had testified in prior cases for the government. ER300–01. He confirmed that the rust accumulation signified that someone had installed the battery compartment at least

five months before Petitioner bought the truck. ER314–17. Mr. Magers also discussed "electrolysis," the chemical decomposition that occurs when an electric current passes through metal. ER312–13. This process occurs with a vehicle battery. ER312–13. Mr. Magers measured the decomposition in the screws in the battery casing's lid and determined there was a year's worth of decomposition. ER313. Based on that, he concluded that he was "[a]bsolulently" sure that the lid was created at least a year before Petitioner's arrest. ER313. Mr. Magers also confirmed that it was not unusual to install a larger battery in a truck like the 2002 Ford Ranger; he did it "regularly" for customers. ER320–21. He did not think a driver would notice the battery as out of place. ER334–35. He also confirmed that the lithium battery would have operated the truck without problem. ER324–27.

4. At closing, the prosecutor focused on the fact that Petitioner was the only one in the truck on the day of his arrest and was the only one with access to it during the time he owned it. ER362–65. He also repeatedly referenced the retail value of the cocaine to contend that Petitioner must have known about the cocaine in the battery casing. ER365, 370. The prosecutor further focused on Petitioner's alleged statement to the pre-primary officer, Officer Magallanes, that he had just changed the truck's battery. ER368–69.

Defense counsel's closing focused on the plausible way the drugs could have been put into the truck without Petitioner's knowledge. Counsel noted that the evidence strongly suggested that the compartment in the trunk's battery casing had been created at least seven months before Petitioner's bought the truck. ER371.

Both the electrolysis analysis and the rust on the bolts holding together the battery established as much. ER371, 379. Counsel focused on the electrolysis:

> And then there's the electrolysis on the screws. And [Mr. Magers] said they examined one of the screws, and the screw had this electrolysis decomposition on it, and he said that was at least a year old, and that's the screw from the inside of the lid of the battery.
>
> So that means whoever screwed that screw together and built that battery compartment did it a year ago because that's how long it would have taken the electricity to have caused the decomposition on the screw.

ER380; *see also* ER386. Counsel stressed that, over a year before Petitioner's arrest, either Encinitas Glass Company or Leucadia Towing had possession of the truck. ER380. Thus, the logical inference was that, someone who had worked for one of those companies had been smuggling drugs in the truck. ER380. Counsel further noted that the jury had heard testimony that drug smugglers hide drugs throughout the smuggling vehicle and that they sometimes bring in huge loads. ER381–82. That made it more plausible that the truck had been loaded with drugs previously and the smuggler left the cocaine in the battery because it had been forgotten or because of something else entirely. Counsel noted that the rest of the government's case was hardly compelling evidence that Petitioner knew about the cocaine. *See*, *e.g.*, ER376–78, 386–87. Reasonable explanations undercut the strength of any other fact that the government relied on. ER387.

In his rebuttal, the prosecutor briefly touched on the defense's theory of how the drugs could have ended up in Petitioner's truck without his knowledge. In doing so, the prosecutor argued that the growth of rust can be accelerated and claimed

that it appeared that there were places in the truck that had not naturally rusted. ER397. The prosecutor, however, did not address the decomposition caused by the electrolysis. But he did again reference the cocaine's retail price. ER396.

During closing, the prosecutor never mentioned the cash found on Petitioner. Thus, while the jury heard that Petitioner had been arrested with a large amount of cash on him in $20 bills, the prosecutor never directed the jury to its relevance.

5. After hearing about six or seven hours of testimony, the jury deliberated for about four or five hours over a two-day period. During their deliberations, they wrote several notes to the judge. In one note, the jury asked for a playback of Petitioner's jail calls, the calls in which he repeatedly discussed the cash found on him. *See* ER408–10. Ultimately, the jury convicted Petitioner of knowingly importing cocaine. ER427.

The court later imposed a prison sentence of over seven years on Petitioner. ER430.

6. On appeal, Petitioner argued that the district court erred by permitting the government to introduce the evidence of the cash found on him. The evidence was both irrelevant and unfairly prejudicial. He further argued that the court erred by permitting the government to introduce evidence of cocaine's retail price. He argued that the effect of these two errors was that it improperly permitted the government to permit him as someone who was a drug dealer who therefore must have known about the drugs in his car. He argued that this errors individually, or collectively, were not harmless.

The court of appeals affirmed. App. 1a–3a. It held that, even if the district court erred, the government had established they were harmless. The court reasoned that there was "substantial evidence" of guilty and the prosecutor did not argue anything about the money to the jury. Pet. App. 2a–3a.

REASONS FOR GRANTING THE PETITION

The court of appeals committed clear error in affirming Petitioner's conviction. A jury convicted him only after the district court permitted the government to introduce a significant amount of evidence that improperly and unfairly portrayed him as a drug dealer. In affirming, the court of appeals did not address whether the court committed error and instead held that the government had proven any error was harmless. The court of appeals misapplied the harmless-error test. 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.

I. The district court reversibly erred by allowing the government to introduce evidence that Petitioner had about $2,300 in cash on him when he was arrested.

At trial, the prosecutor got before the jury that Petitioner had about $2,300 in cash on him in two ways. First, the prosecutor had the arresting agent testify about the cash. ER105. Next, the prosecutor played recordings of Petitioner's jail calls in which he *repeatedly* mentioned the cash. *See* ER415–17, 422–23.

As explained below, the jury never should have heard about the cash. It was irrelevant, and any probative value of the evidence was substantially outweighed by its unfair prejudice. The court's failure to exclude evidence of the cash was "illogical,

implausible, [and] without support in inferences that may drawn from the record," and the court therefore abused its discretion. *See United States v. Christian*, 749 F.3d 806, 810 (9th Cir. 2014) (internal quotation marks omitted) (describing the abuse-of-discretion standard). And contrary to what the court of appeals held below, the government could not prove that the court's error in admitting the cash was harmless. Thus, this Court should remand this case for a new trial.

A. It was not relevant that Petitioner possessed $2,300 in cash, and the court therefore should have excluded the evidence under Rule 401.

Evidence is relevant only if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." FED. R. EVID. 401. "Irrelevant evidence is not admissible." FED. R. EVID. 402. The party asking a court to admit evidence must prove that the evidence is relevant. *See*, *e.g.*, *United States v. Conners*, 825 F.2d 1384, 1390 (9th Cir. 1987); *Spatafore v. United States*, 752 F.2d 415, 419 (9th Cir. 1985). Thus, if the government seeks to introduce a piece of evidence, "the government must show how [the] evidence is relevant," including by "articulat[ing] precisely the evidential hypothesis by which a fact of consequence may be inferred" from the evidence. *United States v. Brooke*, 4 F.3d 1480, 1483 (9th Cir. 1993).

Here, the court found the cash admissible as evidence that Petitioner received prepayment for smuggling the cocaine in the truck. ER37. This theory of admissibility does not establish that the cash was relevant. The court should have excluded it as irrelevant under Rule 401.

First, courts should exclude evidence as irrelevant if it requires "speculation"—that is, an unreasonable inference. *See United States v. Todd*, 964 F.2d 925, 930 (9th Cir. 1992). Here, the inference the court believed the jury could draw from the fact that Petitioner had cash on him—that it was prepayment—is not reasonable inference. It was instead impermissible speculation. *See id.*

The prosecutor alleged in his pretrial filings that Petitioner worked for a "drug-trafficking organization." ER7. Drug traffickers pay couriers *per load* they sneak across the border. *E.g.*, *United States v. Vallejo*, 237 F.3d 1008, 1018 (9th Cir. 2001) (quoting the testimony from an expert put on by the U.S. Attorney's Office for the Southern District of California in which he confirms that drug-trafficking organizations pay drug couriers per load they cross). It is unreasonable to infer, then, that a drug-trafficking organization would pay a courier before he successfully smuggles the load in, especially given the riskiness of sneaking drugs into the United States. At a minimum, nothing suggested that a drug-trafficking organization would prepay someone like Petitioner. That is exactly why experienced defense counsel (who has sat through countless debriefings in drug-smuggling cases) told the court that drug-trafficking organizations do not pay couriers in advance. ER37–38. Indeed, consistent with that accepted truth, the prosecutor (after investigating the case for months) never argued in his pretrial filings that the money reflected advance payment. The court's suggestion to the contrary was sheer speculation.

Not only did the court's theory of admissibility rely on impermissible speculation, it relied on a misunderstanding of conditional relevance. Under Federal Rule of Evidence 104(b), "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced to support a finding that the fact does exist." Here, the court's theory of admissibility hinged on the fact that a drug-trafficking organization would prepay a drug courier like Petitioner *and* that $2,300 was the type of fee a courier would get for four kilograms of cocaine. The government, then, needed to provide evidence "to support a finding that" a drug-trafficking organization would pay Petitioner $2,300 before delivery for four kilograms of cocaine, the factual predicate to its relevancy argument. *See* FED. R. EVID. 104(b).

The prosecutor introduced no evidence to support a finding that drug-trafficking organizations would pay a courier $2,300 for four kilograms of cocaine in advance or that Petitioner in particular received prepayment. In fact, the prosecutor did not even purport to have any such evidence. He just claimed that he could argue the "inference that this is payment for the drugs [Petitioner is] bringing across." ER36. The court itself recognized the lack of evidence on how drug-trafficking organizations worked. When defense counsel objected that drug-trafficking organizations did not prepay couriers, the judge stated that she had "no idea what drug traffickers do" and whether they pre-pay couriers. ER37. The court's admitted lack of knowledge courier payment, however, should have been held against the government as the proponent of the evidence. *See Brooke*, 4 F.3d at 1483 (noting

that the party introducing evidence bears burden to prove its admissibility). Instead, the court effectively held it against Petitioner.

In short, Petitioner possession of about $2,300 in cash did not make a consequential fact more or less probable. The court therefore should have excluded it under Rule 401.

B. Alternatively, the probative value of the $2,300 in cash was substantially outweighed by the unfair prejudice, and the court therefore should have excluded the evidence under Rule 403.

Even if the cash on Petitioner were relevant, the court should have excluded it as unfairly prejudicial under Federal Rule of Evidence 403. Under Rule 403, a court should exclude otherwise admissible evidence if its "probative value is substantially outweighed by the danger of unfair prejudice[.]" While courts have "wide latitude in making Rule 403 decisions," this discretion is "not unlimited." *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). When evidence "is of very slight (if any) probative value, it's 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.* at 424 (emphasis added).

Here, as explained below, the cash on Petitioner is at most slightly probative. On the other hand, its introduction was incredibly unfairly prejudicial. The court, then, should have excluded the evidence under Rule 403.

1. "[T]he probative value of circumstantial evidence depends entirely on the strength of the inference that can be drawn from" the evidence. *Mosier v.*

Stonefield Josephson, Inc., 815 F.3d 1161, 1171 (9th Cir. 2015); *accord United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978). Here, as explained in the prior section, the inference that the court claimed the jury could draw from Petitioner's possession of cash—that it was prepayment for the cocaine in the truck—was a "weak," implausible inference. *See Powell*, 587 F.2d at 448. The cash, then, had little probative value, if any.

2. Given the (at most) slight probative value of the cash, the court erred in admitting it if a "modest likelihood" of unfair prejudice existed. *See Hitt*, 981 F.2d at 424. "'Unfair prejudice'" in this "'context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Advisory Committee's Notes on FED. R. EVID. 403). Here, not only was there a "modest likelihood" of unfair prejudice, Petitioner almost certainly suffered unfair prejudice. *See Hitt*, 981 F.2d at 424.

"Drug dealers" are commonly associated with "carry[ing] large sums of cash." *See United States v. Washington*, 649 F. Supp. 2d 959, 962 (D. Alaska 2009). Moreover, the government had Officer Garcia confirm that Petitioner had $20 bills on him, ER105, and then had Agent Flood tell the jury how much cocaine you could buy in San Diego for $20, ER289. A juror, then, might have inferred from the cash that Petitioner was a drug dealer. As a result, a jury might have taken Petitioner's alleged prior bad acts (his alleged drug dealing) and believed that it "rais[ed] the odds that he did the later bad act now charged (or, worse, calling for preventative

conviction even if he should happen to be innocent momentarily)." *See Old Chief*, 519 U.S. at 180–81. The risk that a juror might take an otherwise admissible piece of evidence as propensity evidence is a prototypical situation in which a court should exclude the evidence under Rule 403. *Id.*; *see also* FED. R. EVID. 404(a) (prohibiting the use of character evidence).

Moreover, if a juror inferred that the cash on Petitioner was prepayment for the cocaine in his truck—the inference the court claimed was appropriate—that would have been unfairly prejudicial as well. As already explained, this inference is implausible, if not outright false. And a court should exclude evidence that allows for a "a false[,] damaging inference about the defendant" if there is only a "slight showing" of prejudice. *See United States v. Bush*, 58 F.3d 482, 489 (9th Cir. 1995). Here, this inference went to the core of the case: if Petitioner received prepayment for the cocaine in the truck, he must have knowingly imported cocaine. Any juror who inferred that Petitioner received prepayment would convict. This is far more than a "slight showing" of prejudice. *See id.*

For these reasons, a huge risk existed that the jury would use the evidence about the cash found on Petitioner in an improper way.

* * *

In sum, even if Petitioner's possession of a large amount of cash were somehow relevant, the probative value of the evidence is weak and the risk of unfair prejudice is significant. The court should have excluded the evidence under Rule 403.

C. The court of appeals clearly erred by holding that the government rebutted the presumption that the erroneously admitted evidence tainted the jury's verdict.

In affirming Petitioner's conviction, the court of appeals held that, even if the district court erred by permitting the government to introduce evidence about the cash found on him, any error was harmless. The court of appeals, however, is wrong.

If a district court erroneously admits evidence, the reviewing court must determine "whether the error was harmless." *United States v. Wells*, 879 F.3d 900, 923 (9th Cir. 2018) (internal quotation marks omitted). The reviewing court should start "with a presumption of prejudice." *United States v. Bailey*, 696 F.3d 794, 803 (9th Cir. 2012); *accord Wells*, 879 F.3d at 923–24. The government can rebut that presumption only if it can establish that it is "more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Wells,* 879 F.3d at 923–24 (internal quotation marks omitted). Here, the government did not meet its burden. This Court must therefore remand this case for a new trial.

1. A trial error in a case in which a defendant is arrested with drugs in his vehicle will typically not be harmless when the defendant has a plausible account for how the drugs could have ended up in the vehicle without the defendant's knowledge. *See United States v. Liera*, 585 F.3d 1237, 1244 (9th Cir. 2009) (listing cases). Petitioner presented the jury with a plausible account for how

the cocaine could have ended up in his truck without his knowledge: it was a leftover load from drug smuggling that had occurred well before he owned the truck.

Significant evidence supported Petitioner's theory. He had owned the truck for at most five months. ER240. The battery casing that contained the drugs was held together in part by bolts, and those bolts had developed significant rust that would have taken over a year to develop naturally. ER184, 217, 314–17. Moreover, to open the casing, someone would have needed to use a tool, and that tool would have left marks on the rust. ER184, 216. The bolts contained no such markings. ER184, 216. The chemical decomposition on the bolts caused by electrolysis also independently confirmed that the bolts had been in place for at least a year. ER312–13. All of that showed that the battery casing, and the drugs, had been placed in the truck at least seven months before Petitioner owned the truck.

Petitioner also introduced evidence that vehicles sneaking drugs into the United States can have drugs hidden *throughout* the vehicle—in the gas tank, side panels, floor, seats, and trunk. ER120–21. He also elicited testimony that established that agents at U.S. ports come across vehicles containing ten times as much drugs as what was found in Petitioner's truck. ER293. Thus, someone with access to the truck before Petitioner could have had snuck drugs into the United States in the truck in those other places and for whatever reason left behind the cocaine in the battery casing.

This evidence provided the jury with a basis to have a reasonable doubt about whether Petitioner knew about the cocaine in his truck.

In response, the prosecutor offered speculation that the rust growth had been unnaturally accelerated during the time Petitioner owned the truck. ER220–21, 397. That response, however, does not account for metal's decomposition caused by the electrolysis. ER312–13. And the prosecutor introduced no evidence even suggesting that the decomposition caused by the electrolysis had been, or could be, manipulated. That is why Petitioner's vehicle expert (who has testified for the U.S. Attorney's Office in other cases as well) stated that he was "[a]bsolutely" sure the lid to the battery casing had been created, and not opened, for at least a year. ER313.

The prosecutor also introduced little evidence that Petitioner knew about the drugs, besides the fact that he drove a truck with hidden drugs, a fact consistent with his plausible defense. The evidence the prosecutor did introduce that contradicted the defense theory was all contested. For example, the prosecutor heavily relied on Officer Magallanes claim that Petitioner said he had recently changed the truck's battery, a fact inconsistent with his defense. ER53–54. Officer Magallanes claimed he remembered that detail because he vividly recalled the details of Petitioner's arrest. ER66. But when asked other details about the arrest, Officer Magallanes couldn't recall any of them. ER66. That raised doubts about whether he had accurately remembered what Petitioner had said.

2. The "highly prejudicial nature" of the erroneously admitted evidence makes it more likely that this evidence might have made the difference for jurors and swayed them to convict. *See United States v. Hernandez*, 109 F.3d 1450, 1453

(9th Cir. 1997) (vacating conviction because the district court admitted highly prejudicial evidence in the form of a defendant's prior conviction).

As noted above, the jury could have assumed that Petitioner worked as a drug dealer from his possession of $2,300 in cash, mostly in twenty-dollar bills. The jury then might have used it as improper propensity evidence. That would have undermined his defense. They might have convicted him because they believed he was a drug dealer and so must have known about the cocaine. Indeed, evidence suggesting that the defendant deals drugs invariably has the effect of "stir[ring] the jury's emotions in a prejudicial fashion." *See United States v. Moorehead*, 57 F.3d 875, 879 (9th Cir. 1995).

On the other hand, if the jury inferred that the cash was prepayment for the drugs, the evidence constituted damning evidence of guilt. If Petitioner received prepayment for the drugs in the truck, he must have known about the cocaine. The problem, of course, is that this inference is just not true—or, at a minimum, highly implausible.

3. In affirming, the court of appeals held the error was harmless because the prosecutor did not raise any argument about the cash during his closing argument. Pet. App. 2a. But the prosecutor's failure to mention the evidence cut both ways. The prosecutor got this explosive piece of evidence before the jury that the court had admitted on a narrow basis and then the prosecutor never directed the jury to the evidence's narrow relevance. Thus, the prosecutor just let jurors infer from it whatever they wanted. And once the prosecutor didn't mention it during his

closing, it made no sense for defense counsel to raise it, explain the evidence's alleged narrow relevancy, and then rebut it.

Moreover, while the prosecutor did not mention the cash during closing, the jury was reminded about it as they debated whether to convict or acquit Petitioner anyway. During deliberations, the jury asked the court to play back his calls in which he *continually* references the cash. *See* ER08–10, 415–17, 422–23. So just before the jury ultimately voted to convict, they were reminded about the cash.

For these reasons, the government did not prove that the error here was harmless, and the court of appeals erred.

* * *

In sum, this Court should vacate Petitioner's conviction. The evidence of cash on him was irrelevant and unfairly prejudicial. Its erroneous admission tainted the verdict. He should receive a new trial.

II. The district court reversibly erred by allowing the government to introduce evidence of cocaine's retail price in San Diego.

The district court committed a second significant evidentiary mistake that allowed the government to reinforce the idea that Petitioner was a drug dealer. The court allowed the government to introduce evidence of cocaine's retail (that is, street-level) price. The prosecutor asked to introduce both the wholesale and retail price as "circumstantial evidence of [Petitioner's] knowledge of the drugs that were hidden in his vehicle." ER7. The prosecutor claimed that the high monetary value of the cocaine made it more likely that Petitioner knew about the cocaine in his truck.

ER7. The court agreed that the wholesale and retail price of cocaine was admissible to prove knowledge. ER27.

As explained below, the court should not have allowed the government to introduce the wholesale *and* retail price of cocaine under Rule 403—the court should have permitted the government to introduce the wholesale price only. The court's failure to exclude evidence of retail price under Rule 403 was "illogical, implausible, [and] without support in inferences that may drawn from the record," and the court abused its discretion. *See Christian*, 749 F.3d at 810 (internal quotation marks omitted) (describing the abuse-of-discretion standard). Moreover, contrary to what the court of appeals held, the government did not prove that the court's error in admitting this evidence was harmless. This Court should therefore remand this case for a new trial.

A. Any slight probative value of cocaine's retail price in San Diego was substantially outweighed by the unfair prejudice, and the court therefore should have excluded the evidence under Rule 403.

As noted above, Rule 403 requires a court to exclude otherwise admissible evidence if its "probative value is substantially outweighed by the danger of unfair prejudice[.]" In conducting this balancing and determining whether a particular piece of evidence is too unfairly prejudicial, courts should "compar[e] evidentiary alternatives[.]" *Old Chief*, 519 U.S. at 185. That is, when a court evaluates a piece of evidence's probativeness, it must consider "'the availability of other means of proof'"

and whether the other means of proof is likely to be as unfairly prejudicial. *Id.* (quoting Advisory Committee's Notes on FED. R. EVID. 403).

Here, as explained below, the probative value of the retail price of the cocaine in Petitioner's truck was virtually non-existent. That's because introducing just the wholesale value of the cocaine would have served the same purpose as introduce the wholesale and retail value. On the other hand, the risk of unfair prejudice in introducing the retail value was high. The evidence connected Petitioner to street-level drug dealing. The court, then, should have excluded the evidence under Rule 403.

1. The government can introduce evidence of the wholesale value or retail value (or both) of drugs in a defendant's control when the government charges the defendant with possession with intent to distribute. *See*, *e.g.*, *United States v. Savinovich*, 845 F.2d 834, 838 (9th Cir. 1988); *United States v. Kearney*, 560 F.2d 1358, 1361, 1369 (9th Cir. 1977); *United States v. Ramirez-Rodriquez*, 552 F.2d 883, 885 (9th Cir. 1977). That is because the "[i]ntent to distribute may be inferred from the purity, price, and quantity of the drug possessed." *Savinovich*, 845 F.2d at 838 (listing cases). The government, however, did not charge Petitioner with possession with the intent to distribute. Instead, the government charged Petitioner with knowing importation. ER1. There was no need, then, to get the jury to infer that he had the intent to distribute the cocaine.

There is also a second permissible basis to introduce the value of drugs in a case in which drugs are in a defendant's vehicle: as evidence of knowledge. *See*, *e.g.*,

United States v. Morales-Beltran, 534 F. App'x 598, 600–01 (9th Cir. 2013). In these cases, courts have reasoned that the fact that the drugs have a high monetary value makes it less likely that the defendant didn't know about the drugs. *E.g.*, *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1265 (9th Cir. 1998). The prosecutor relied on this second rationale to argue that the wholesale and retail value of the cocaine in Petitioner's truck was admissible. ER7–8. The district court agreed with the prosecutor. ER27–28.

The problem with the prosecutor's theory of admissibility is that it could have proved to the jury that the cocaine was worth a lot of money by introducing its wholesale value only. Its wholesale value was about $72,000, whereas its retail value was about $100,000. ER288. There was no discernable benefit to introducing the wholesale *and* retail value. Indeed, neither the prosecutor nor the court identified any *additional* probative value of the retail price. Thus, when considering the "evidentiary alternatives," the retail value was *minimally* probative. *See Old Chief*, 519 U.S. at 185.

2. Because introducing the retail price added nothing of value to the government's case beyond that provided by wholesale price, the court should have excluded retail price if there was "even a modest likelihood of unfair prejudice or a small risk of misleading the jury." *See Hitt*, 981 F.2d at 424. The unfair prejudice caused by evidence of retail value easily clears that bar. The court should have excluded it.

As defense counsel explained to the district court, referencing cocaine's retail price tied Petitioner to street-level drug dealing. ER15. Moreover, mentioning its value in San Diego in particular tied it to the jury's community. ER288. It implied to the jury that the prosecutor believed that Petitioner would sell the cocaine himself in their community for that price. The prosecutor helped feed into this misperception by having Agent Flood testify about how much cocaine someone could buy for twenty dollars in San Diego. ER289. This connected with the arresting agent's testimony that Petitioner was arrested with about $2,300 in cash, "mostly $20 bills." ER105.

Introducing cocaine's retail price reinforced the image the government created with introducing the $2,300 in cash: that Petitioner worked as a street-level drug dealer and so was guilty. Simply put, evidence about cocaine's retail price in San Diego, especially when combined with the cash, was improper propensity evidence that the government could use to tar Petitioner. Like the cash, this evidence was substantially unfairly prejudicial. The court should have excluded it.

B. The court of appeals clearly erred by holding that the government rebutted the presumption that the erroneously admitted evidence tainted the jury's verdict.

In affirming Petitioner's conviction, the court of appeals held that, even if the district court erred by permitting the government to introduce evidence about cocaine's retail price, any error was harmless. The court of appeals, however, is wrong. The court again got it wrong.

As already explained, Petitioner could plausibly explain how the cocaine ended up in his truck without his knowledge. That made this a close case. The government can't prove, then, that the court's error in admitting the retail value of cocaine didn't affect the verdict. *See Liera*, 585 F.3d at 1244. Moreover, as with the cash, evidence of retail value was especially prejudicial because it allowed the government to paint Petitioner as a drug dealer. That the erroneously admitted evidence was highly prejudicial means it is more likely to have tainted the verdict. *See Hernandez*, 109 F.3d at 1453. The prosecutor also emphasized the retail value of the cocaine during closing argument, ER370, and his rebuttal argument, ER396. This made it less likely that the evidence didn't affect the jury's verdict. *See United States v. Martinez*, 796 F.3d 1101, 1107 (9th Cir. 2015) (holding that the erroneous admission of evidence was not harmless, in part, because of the prosecutor's emphasis of that evidence during closing argument); *United States v. Brown*, 880 F.2d 1012, 1016 (9th Cir. 1989) (same). Thus, the government cannot prove that the error here was harmless—that the retail value of the cocaine didn't matter.

* * *

In sum, this Court should vacate Petitioner's conviction. Evidence about the retail value of the cocaine in his truck was unfairly prejudicial. Its erroneous admission tainted the verdict. He should receive a new trial.

III. Even if the court's errors in admitting the $2,300 in cash and cocaine's retail price do not individually require this Court to reverse, the combined prejudicial effect of these errors require reversal.

Even if this Court does not agree that the errors raised above individually require reversal, the combined effect of the errors certainly do. *See United States v. Wallace*, 848 F.2d 1464, 1475–76 (9th Cir. 1988) (holding that several errors, considered together, established reversible error). The erroneously admitted evidence cumulatively painted Petitioner as a drug dealer. In a case like this one, that could have made the difference and persuaded a juror on the fence to vote to convict. This Court should therefore remand this case for a new trial.

* * *

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.

July 16, 2020

Respectfully submitted,

s/ Doug Keller

Doug Keller

Appendix

NOT FOR PUBLICATION

FILED

JUL 2 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GILBERTO MARTINEZ-HERNANDEZ, Defendant-Appellant.	No. 18-50336 D.C. No. 3:17-cr-04141-BAS-1 MEMORANDUM*

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

Submitted May 13, 2020**
Pasadena, California

Before: WARDLAW, COOK,*** and HUNSAKER, Circuit Judges.

Gilberto Martinez-Hernandez appeals his conviction for knowingly importing cocaine, arguing the district court abused its discretion by admitting

* 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).

*** The Honorable Deborah L. Cook, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

evidence at trial of the $2,283 he had in his pocket at his arrest and the retail value of four kilograms of cocaine. He also seeks remand for an evidentiary hearing regarding whether the prosecutor engaged in misconduct related to the cash evidence. We have jurisdiction under 28 U.S.C. § 1291. We affirm the conviction and decline to remand for an evidentiary hearing.

Even if the district court abused its discretion in admitting the challenged evidence, the error was harmless because "it is more probable than not that [it] did not materially affect the verdict." *United States v. Liera*, 585 F.3d 1237, 1244 (9th Cir. 2009) (citing *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002)). The Government presented substantial evidence of Martinez-Hernandez's guilt separate from the evidence of the cash or the cocaine's retail value. *Cf. id.* at 1244–45. Moreover, neither party argued the import of the cash evidence to the jury, and Martinez-Hernandez does not challenge the admission of the cocaine's wholesale value on appeal. Thus, considering both the individual and cumulative effects of the challenged evidence, we conclude there is no reversible error.

We also conclude that remand for an evidentiary hearing is unwarranted. Martinez-Hernandez argues the prosecutor had a *Brady* obligation to correct the district court's proffered theory of relevance of the cash evidence, but he has not established that any such duty existed. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). And even if he had, again, we conclude any error was harmless.

The district court's theory that the cash was relevant to show possible prepayment for drug trafficking could not have materially affected the fairness of the trial where the theory was proffered outside the presence of the jury, and the Government did not present or argue it to the jury. *See United States v. Alcantara-Castillo*, 788 F.3d 1186, 1190–91 (9th Cir. 2015). And, as just discussed, it is not probable that admission of the cash evidence materially affected the verdict given the force of the evidence against Martinez-Hernandez. *Cf. id*. at 1198.

AFFIRMED.