

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS **FILED**
FOR THE NINTH CIRCUIT JAN 19 2023

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

UNITED STATES OF
AMERICA,

Plaintiff-Appellee,

v.

DELILAH GUADALUPE
DIAZ,

Defendant-Appellant.

No. 21-50238 U.S. COURT OF
APPEALS

D.C. No.
3:20-cr-02546-AJB-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Anthony J. Battaglia, District Judge, Presiding

Submitted December 8, 2022**
Pasadena, California

Before: BEA, IKUTA, and CHRISTEN, Circuit
Judges.

Defendant-Appellant Delilah Diaz appeals a jury
verdict finding her guilty of importing
methamphetamine in violation of 21 U.S.C. §§ 952
and 960. Diaz appeals her conviction on four main
grounds, alleging that the district court erred by: (1)

* 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).

admitting only some clips from the recording of her post-arrest interview; (2) precluding Diaz from arguing an adverse inference arising from the government's decision not to introduce the entire recording; (3) excluding a witness the defense untimely disclosed in the middle of the trial; and (4) admitting the government expert's testimony. Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court's rulings.

1. Diaz argues that the district court erred by denying her motion in limine seeking the admission of the entire recording of her post-arrest interview. She identifies six unplayed clips of the recording that were relevant for a non-hearsay purpose and, in her view, should have been admitted. We review de novo the district court's interpretation of the hearsay rule but review for abuse of discretion the district court's rulings on objections based on hearsay, prejudice, and the rule of completeness. *See United States v. Gomez*, 6 F.4th 992, 1007 (9th Cir. 2021); *United States v. Town of Colorado City*, 935 F.3d 804, 807 (9th Cir. 2019); *United States v. Vallejos*, 742 F.3d 902, 905 (9th Cir. 2014). In the district court, Diaz did not identify particular excerpts of the recording that were relevant for non-hearsay purposes, and sought only to "admit the entire [recording of her statement] if the government seeks to play any portion thereof" to show how the interrogating officer's "adversarial tone" affected Diaz's answers and to "provide a full picture of what happened." When it denied that motion, the court noted that the recording contained hearsay but was clear that the entire video was inadmissible merely to show the

context of the interview. The rule of completeness permits the introduction of the remainder of an excerpted statement to prevent the factfinder from being misled by the excerpted portion that is introduced. *See Vallejos*, 742 F.3d at 905. The district court did not err by ruling that context is an insufficient justification for admitting the entirety of Diaz’s interview. *See United States v. Dorrell*, 758 F.2d 427, 434–35 (9th Cir. 1985). When the district court denied the motion in limine, it explicitly invited Diaz to offer any specific clips at trial that were admissible under either Rule 106 or any of the hearsay exceptions. Diaz declined to do so. When the government played its clips at trial, Diaz neither objected to them nor sought to introduce the six clips she identifies for the first time on appeal. Diaz thus forfeited the opportunity to challenge the denial of the motion in limine to the extent it prevented her from offering any additional portions of the recording. *See Adkins v. Mireles*, 526 F.3d 531, 542–43 (9th Cir. 2008).

2. Diaz contends the court erred by precluding her from making an adverse inference argument based on the government’s decision not to introduce the entire recording. We review limitations on the scope of closing argument for abuse of discretion. *United States v. Lazarenko*, 564 F.3d 1026, 1043 (9th Cir. 2009). As the district court explained, “I ruled certain portions of these [video clips] can be shown and certain portions cannot. And the *parties* are limited to showing what I am allowing. It’s not *their* doing. It’s mine” (emphasis added). The court did not abuse its discretion by ruling that the defense’s efforts to attribute the absence of the entire recording to the government was improper argument. *See*

United States v. Doe, 705 F.3d 1134, 1149 (9th Cir. 2013) (observing that it “is well within the court’s discretion” to “prevent[] [the defendant] from arguing incorrect statements”). The court instructed the jury that both parties were presenting only as much of the video as the court had admitted, and Diaz assented to this instruction. Diaz’s challenge to the district court’s limitation on the scope of her closing argument therefore fails.

3. Diaz contends the district court violated her Sixth Amendment rights by excluding the cell phone witness, whom Diaz identified for the first time during the lunch recess on the second day of trial. The district court excluded this witness as a discovery sanction, which we review for abuse of discretion. *Liberty Ins. Corp. v. Brodeur*, 41 F.4th 1185, 1189 (9th Cir. 2022). We see no error. The court had, on Diaz’s motion, set a cut-off date two months before trial for “all remaining disclosures [and] discovery” and specified that, after that date, “anything new” would not be admitted without “a showing that despite the exercise of reasonable diligence it couldn’t have been produced sooner.” Although Diaz cites *United States v. W.R. Grace*, 526 F.3d 499, 509 n.7 (9th Cir. 2008) (en banc), in support of her argument that the court’s discovery order exceeded its authority, we need not reach Diaz’s constitutional challenge. Diaz requested a discovery cut-off and the exclusion sanction was within district court’s inherent power to achieve the orderly and expeditious disposition of its cases, which includes “broad discretion . . . to exclude testimony of witnesses whose use at trial is in bad faith or would unfairly prejudice an opposing party.” *S.M. v. J.K.*, 262 F.3d 914, 919 (9th Cir. 2001), *amended*, 315 F.3d

1058 (9th Cir. 2003). The district court observed that the defense’s untimely disclosure of the witness in the middle of the second day of trial was “last-minute sandbagging,” “intent[ional],” and “unfair.” The district court did not abuse its discretion by excluding the witness. *See Taylor v. Illinois*, 484 U.S. 400, 415–16 (1988) (rejecting a criminal defendant’s argument that preclusion of a defense witness is never a permissible sanction for an intentional discovery violation).

4. Diaz argues the district court erred by admitting the government expert’s modus operandi testimony on drug trafficking organizations’ use of unknowing couriers. We review objections to the admissibility of expert testimony for abuse of discretion. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999). Diaz argues that the court’s reliability finding was improper. A district court “abdicates its gatekeeping role, and necessarily abuses its discretion, when it makes no reliability findings,” but the district court has “flexibility” in “how to determine reliability.” *United States v. Valencia-Lopez*, 971 F.3d 891, 898 (9th Cir. 2020) (emphasis omitted). Here, the district court made a reliability finding on the record that mentioned not only the expert’s qualifications, but also his “technical or specialized knowledge,” “training[] and experience,” and “a reliable methodology.” The court also noted that it had heard this particular expert testify “at least ten times” before. Diaz contends that the expert testimony was irrelevant and unduly prejudicial, but we have held that this type of modus operandi evidence is relevant when a defendant puts on an unknowing courier defense because it goes “right to the heart of” that defense. *United States v.*

Murillo, 255 F.3d 1169, 1177 (9th Cir. 2001), *abrogated on other grounds by Muehler v. Mena*, 544 U.S. 93 (2005). Diaz “opened the door” to expert testimony by calling her own expert to testify to facts that supported her blind mule defense. *See United States v. Sepulveda-Barraza*, 645 F.3d 1066, 1072-73 (9th Cir. 2011). Finally, Diaz argues that testimony that drug trafficking organizations rarely use unknowing couriers is the “functional equivalent” of a prohibited opinion on mental state. This is contrary to our precedent. Diaz is correct that the Fifth Circuit has adopted this view, *see, e.g., United States v. Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002), but we have allowed such testimony so long as the expert does not provide an “explicit opinion” on the defendant’s state of mind, *see, e.g., United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013) (citation and internal quotation marks omitted), and the expert did not do so here. Diaz’s challenges to the expert witness’s testimony therefore fail.

AFFIRMED.

7a

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS **FILED**
FOR THE NINTH CIRCUIT

MAR 3 2023

MOLLY C. DWYER,
CLERK

U.S. COURT OF
APPEALS

UNITED STATES OF
AMERICA,

Plaintiff-Appellee,

v.

DELILAH GUADALUPE
DIAZ,

Defendant-Appellant.

No. 21-50238

D.C. No.

3:20-cr-02546-AJB-1

Southern District of
California, San Diego

ORDER

Before: BEA, IKUTA, and CHRISTEN, Circuit
Judges.

The panel has voted to deny the petition for panel rehearing. Judges Ikuta and Christen have voted to deny the petition for rehearing en banc, and Judge Bea so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

APPENDIX C

[01]

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF
AMERICA,

Plaintiff,

v.

DELILAH GUADALUPE
DIAZ,

Defendant.

No. 3:20-CR-2546-AJB

March 18, 2021

Courtroom 4A

San Diego, California

TRANSCRIPT OF PROCEEDINGS

(Jury Trial – Day 3)

**BEFORE THE HONORABLE
ANTHONY J. BATTAGLIA, DISTRICT JUDGE**

REPORTED BY: AMANDA M. LeGORE
RDR, CRR, CRC, FCRR, CACSR
U.S. District Court
333 West Broadway, Suite 420
San Diego, CA 92101
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* * *

**[TESTIMONY OF SPECIAL AGENT
ANDREW FLOOD]
[DIRECT EXAMINATION]**

[20:4]

THE COURT: Good morning, folks. Welcome back. We're here for day three of the trial.

And counsel and the parties are here. Witnesses ready to go. We're making good progress.

The Government has one witness left in its case-in-chief that we'll hear from. The defense has three witnesses we'll hear from. And so it may be by day's end you'll have the case for deliberation as we had anticipated. So we're making really good time.

So let's turn to the Government's next evidence.

And, Mr. Olah, who will you be presenting next?

MR. OLAH: Special Agent Andrew Flood, your Honor.

THE COURT: Okay. Let's bring Special Agent Flood forward.

THE CLERK: Please raise your right hand.

(Witness sworn.)

THE WITNESS: I do.

THE CLERK: Thank you. You may be seated.

You'll place the clear mask on after you take your current mask off. And then please place the microphone on your lapel or collar. Angle it upwards, if you don't mind. Thank you.

[21] And then please state your first and last name, and spell your last name for the record.

THE WITNESS: Andrew Flood. A-N-D-R-E-W, F-L-O-O-D.

THE COURT: Thank you, sir.
Go ahead, Mr. Olah.

DIRECT EXAMINATION

BY MR. OLAH:

Q. Good morning, Agent Flood.

A. Good morning.

Q. Where do you work?

A. I'm a special agent with Homeland Security Investigations.

Q. And how long have you been with HSI?

A. I've been a special agent since 1996. So going on 20 — I believe 28 years.

Q. Were you in law enforcement before joining HSI?

A. Prior to becoming a special agent, I was a U.S. Border Patrol agent. And prior to that, I was a sheriff's corrections deputy.

Q. How many years between those two prior agencies?

A. I was — started as a sheriff's deputy in 1994; as a Border Patrol agent in 1995.

Q. Have you been involved in drug trafficking investigations as a special agent with HSI?

A. Yes, I have.

Q. Approximately how many such investigations?

[22]

A. I've been involved in over 500 investigations dealing with distribution of drugs and also the – which would include the importation of drugs.

Q. And can you summarize for the jury the various investigation techniques you've used?

A. The techniques I've used, I've utilized wiretaps, where you actually listen to a drug trafficker talk on the telephone and how they conduct business.

I've done controlled purchases where I utilized an undercover agent or a cooperating source. And we actually go out on the street and buy the drugs.

I've spoken with cooperating defendants that have been arrested for drug trafficking related offenses. I've talked to cooperating sources that have information related to the distribution of drugs and drug trafficking organizations.

I have spoken with other agents that work drug trafficking organizations and have worked on task forces with other agencies such as the Federal Bureau of Investigation, the Drug Enforcement Administration, and local police departments dealing with drug trafficking related crimes.

Q. You noted you have interviewed cooperators. Have you interviewed subjects under investigation?

A. Yes, I have.

Q. What about search warrants? Have you sought and enforced or executed search warrants?

A. Yes. I have sought and executed search warrants and found the instrumentalities of drug trafficking, drug distribution.

Q. Do you speak on a regular basis with other agents and officers about drug trafficking?

A. Yes, I do. And I work on a task force with different agencies that handle drug trafficking investigations.

Q. What is the – what is that task force?

A. I – currently I am assigned to the violent crimes task force here in San Diego.

Q. And what other agencies contribute to that task force?

A. The Federal Bureau of Investigation, San Diego Police Department, San Diego sheriff's department, Chula Vista Police Department, National City Police Department, the Federal Bureau of Prisons, and San Diego Probation.

Q. Is it important to your work to know the value of controlled substances?

A. Yes. It's more of a safety concern.

When I conduct controlled purchases, where we go out and actually buy the drugs from a drug distributor, it's important to know that the price we are being offered is consistent with the rate that's going at that time.

The reason why it's a safety concern is if they're offering us a really high price for the drugs, it's a possibility that they may just rob our cooperating

source or undercover agent. So it's a safety concern for everyone. [24]

And then there's the possibility, if we're willing to pay such a high price for the drugs, that they'll believe we're the police and may not want to deal with us. And so it may end the investigation there.

Q. Agent Flood, have you testified on the value of drugs before?

A. Yes, I have.

Q. Have you testified as an expert in drug trafficking?

A. Yes, I have.

Q. Between those two areas, how many times would you estimate you have testified?

A. I have testified over 50 times in federal court and also state court.

MR. OLAH: Your Honor, at this time the United States asks that the Court allow Agent Flood to give opinion testimony under 702 based on his knowledge, training, and experience.

THE COURT: And any objection as to the qualifications, Ms. Iredale? Or questions you would like to ask?

MS. IREDALE: No objection, your Honor.

THE COURT: All right. The Court will grant the request, and the witness may testify based on his expertise, based on the areas mentioned.

Go ahead, Mr. Olah.

MR. OLAH: Thank you, your Honor.

[25] BY MR. OLAH:

Q. Agent Flood, why are drugs imported into the United States?

MS. IREDALE: Objection, 401.

THE COURT: Overruled.

THE WITNESS: Based upon drugs that – some drugs are manufactured in Mexico and outside the United States. Therefore, they're brought across the border, into the United States to be sold.

BY MR. OLAH:

Q. Is there a market here in the United States?

A. Pretty much the market for the drug is here in the United States, where people are willing to pay a good price for the drugs.

Q. What are the ways in which drugs are brought from Mexico into the United States?

A. They are concealed in conveyances. Pretty much every type of conveyances. Cars, trucks. Anything you can hide drugs in. They're carried on people, on their persons, inside their persons. They are brought in through the maritime, through boats and also airplanes, drones. There's very many techniques in which to smuggle drugs into the United States.

Q. With respect to vehicles, can you describe the general process of movement from Mexico to wherever it goes?

A. From Mexico, they are packaged. They are put into, say, [26] a – a conveyance, a vehicle. Hidden in voids, compartments. I have seen drugs hidden in every area of a vehicle. In the engine block, in the

seats, in the tires, in the – the – the quarter panels, in various areas. And then they are transported from point A to point B across the border.

Q. And based on your training and experience, are the transporters compensated for their efforts?

A. Yes. It's a job. It's to take it from point A to point B.

Q. And what forms of compensation have you come across, in your experience?

A. Primarily money. But other forms would be in drugs, use of the vehicle, or to repay debts.

Q. When you say "use of the vehicle," that means beyond the importation use. Correct?

A. Yes. Where the car is registered to that person's name, and they use the vehicle.

Q. Agent Flood, based on your training and experience, are large quantities of drugs entrusted to drivers that are unaware of those drugs?

MS. IREDALE: Objection. 401, 403.

THE COURT: Overruled.

THE WITNESS: No. In extreme circumstances – actually, in most circumstances, the driver knows they are hired. It's a business. They are hired to take the drugs from [27] point A to point B.

BY MR. OLAH:

Q. And why aren't – why don't they use unknowing couriers, generally?

MS. IREDALE: Objection. 401, 403.

THE COURT: Overruled. You may answer.

THE WITNESS: Generally, it's a risk of your – your cargo not making it to the new market; not knowing where it's going; not being able to retrieve it at the ending point, at your point B. So there's a risk of not delivering your product and, therefore, you're not going to make any money.

BY MR. OLAH:

Q. Agent Flood, are you familiar with the TECS database? That's T-E-C-S.

A. Yes.

Q. Do you use it in your investigations?

A. Yes.

Q. Is it a useful tool to locate an individual if all you have is a name?

A. Is it to identify a person?

Q. Correct.

A. We prefer a name, date of birth, or at least a – an age range.

Q. Okay. Were you asked to consult on the methamphetamine seized in this case?

[28]

A. Yes, I was.

Q. Were you provided with any materials regarding their case?

A. I reviewed the DEA lab results.

Q. What information on the DEA lab results are relevant to your analysis?

A. I reviewed the pure methamphetamine – the amount of pure methamphetamine, in this instance, that was tested by the lab.

Q. Did you consult with any other materials in this case?

A. I also, based upon my training and experience, also utilized – consulted with a publication put out by the Narcotics Information Network. It's a publication that has drug prices for different quantities and different types of drugs here in San Diego, in Imperial County.

Q. Is that publication updated regularly?

A. Yeah, it's actually a biannual. It's put out in January and in July.

Q. And were you provided with a seizure date in this case?

A. Yes, I was.

Q. I'm showing you what's been premarked as Exhibit 9-1.

MR. OLAH: This should not be published to the jury yet.

BY MR. OLAH:

Q. Agent Flood, can you see what's on the monitor before you?

A. Yes. This is the chart I produced.

Q. Is it a fair and accurate chart that you produced?

[29]

A. Yes, it is. But I also notice I spelled California wrong on the wholesale price.

Q. Does it summarize your conclusions?

A. Yes, it does.

Q. And did you verify – verify the amounts and the calculations on the exhibit prior to testifying today?

A. Yes, I did.

Q. Will this exhibit assist you in explaining your calculations to the jury?

A. Yes, it will.

MR. OLAH: Your Honor, I would request permission to publish Exhibit 9-1 as a demonstrative exhibit.

THE COURT: And any objection?

MS. IREDALE: No objection as a demonstrative publication.

THE COURT: All right. So it will be – the request will be granted. It may be published as a demonstrative, which means, folks, you won't have this in the jury room. It's just to assist the officer – or the agent in presenting his testimony.

So take careful notes of what he says because that's what you'll have when you deliberate.

Go ahead, Mr. Olah.

(Exhibit 9-1 published.)

BY MR. OLAH:

[30]

Q. Sure. So, Agent Flood, can you walk us through this exhibit, starting on the top, working your way down.

A. This chart is the – for the methamphetamine value in August 2020, which is the month of the seizure. There was a seizure of 24.57 kilograms of pure methamphetamine.

Q. So, Agent Flood, I'm going to interrupt you here.

What – where did you get that figure, the 24.57?

A. From the DEA lab results.

Q. Okay. And which – which figure on those lab results did you use?

A. 24.57 kilograms of pure methamphetamine.

Q. So you used the pure substance weight on the DEA analysis form?

A. Yes, I did.

Q. Are there other – other cumulative weights on that form?

A. Yes. There's also the net weight of the drugs, and then also the pure weight.

Q. And you used the pure?

A. I used the pure methamphetamine.

Q. Thank you. Please proceed.

A. Based upon the DEA lab results, there was 24.57 kilograms of pure methamphetamine that was seized. Methamphetamine, when sold in bulk quantities, it's sold in pound quantities. So I took the 24.57 kilograms and put it into pounds.

There are 2.2 pounds in a kilogram. I multiplied the [31] 24.57 kilograms times 2.2 to get a value of 54.05 pounds of pure methamphetamine that was seized.

A wholesale price sold in pound quantities in San Diego ranged between a thousand and \$2750 per pound in August of 2020.

I took the amount seized, 54.05 pounds, multiplied that by the lower end of the range, a thousand dollars per pound, to get a value of \$54,050.

Q. So, Agent Flood, at the time, the range per pound of methamphetamine was 1,000 to 2,750. Is that correct?

A. That's correct. I utilized the low end of the range to be on the conservative side. In any commodity, there are several factors that – that affect the price. Your – your buyer/seller relationship. Your – basically the amount that's – I'm trying to think of the word off the top of my head. It doesn't – if you have a lot of product, you usually get a better price. And if the market is flooded with methamphetamine, usually the prices get lower. So I utilized the low end of the scale, that \$1,000 per pound.

Q. Thank you. And what's – what's the retail line? What does that refer to?

A. The retail value of the methamphetamine refers to basically what a user of methamphetamine would use – would buy to use.

A user of methamphetamine uses between .05 and .2 [32] grams, up to a gram; 1 gram. There are 454 grams in a pound. In August of 2020, a gram of methamphetamine ranged from \$15 to \$40.

Q. Your – go ahead.

A. And there was – there's a thousand grams – in one kilogram is a thousand grams. In 24.57 kilograms, there's 24,570 grams of methamphetamine.

Q. And what – also, that last – that last calculation.

A. And, once again, I utilized the conservative end of the low end of the range. So I multiplied 24,570 grams times \$15 per gram to get a value on the low end of \$368,550.

Q. And, again, that's using the low end. The \$15 per gram figure. Correct?

A. Correct.

MR. OLAH: No further questions, your Honor.

THE COURT: All right. Ms. Iredale, any cross-examination?

MS. IREDALE: Yes, your Honor.

CROSS-EXAMINATION

BY MS. IREDALE:

Q. Good morning.

A. Good morning.

Q. I just have a few questions for you.

You had no involvement in the investigation of this case. Right?

[33]

A. No, I did not investigate this case. No.

Q. You did not search the car in this case?

A. No, I did not.

Q. You talked about the way that drugs get into this country. Yes?

A. Correct.

Q. A lot of drugs make it in. Right?

A. I can't give you an amount, but drugs do make it in because I can purchase it on the street.

Q. And drug trafficking is a billion-dollar industry. Right?

A. Drug trafficking is a business about making money, and as much money as possible.

Q. You would agree that it's a billion-dollar industry?

A. I think – I can't give you an exact amount. But, yes, they do make a lot of money.

Q. I don't want to misquote you, but you said that blind mules –

And before we talk about this, is a "blind mule" kind of a tech – technical term for an unknown courier?

A. Yes. The term "blind mule," the only time I've ever heard it is in court.

I – I refer to it – to the name, like an unknowing courier, a person who doesn't know they're carrying drugs.

Q. So you said that unknowing couriers are very rare.

A. Yes.

Q. You work for HSI. Right?

A. Correct.

Q. And you're aware that your own agency has identified many schemes where drug trafficking organizations use unknowing couriers. Right?

A. I – I know of three schemes that were primarily identified as being possible for an unknowing courier. It doesn't necessarily mean that they are unknowing couriers.

One of those schemes is where a magnet of drugs is placed under – on – on a vehicle, underneath a vehicle.

Another scheme is where, say, a spare tire is put on the back of, say, a – in the back of a pickup bed, where it's easily accessible.

And another scheme is where a person is hired for employment, where they answer an ad in a newspaper, where they're hired to drive a company vehicle from Mexico into the United States for a job.

Those are all possible schemes where unknowing couriers are possible. But just those schemes doesn't reflect that they actually are unknowing couriers. I've had investigations involving each where actually the person stated they were hired to bring drugs across the border.

Q. So you're not aware that your agency, in November and December of 2020, came into possession of information regarding a drug trafficking organization in Tijuana which is using [35] unknowing drivers to smuggle narcotics into the United States? You're not aware of that?

A. Ah, specifically on that date, I am – I am not aware of that date specifically. But, yes, of the idea that the concept of unknowing couriers utilized for bringing in drugs and usually would facet those schemes I was talking about.

It basically is where the person is – has a known destination. Say a Sentury card user that lives in Mexico and works in the United States. They go to work every morning at a specific time. They arrive at, say, a hospital. In a hospital parking lot every Monday through Friday, at a certain time, where the car can be easily accessed so the drugs can be taken out. Stuff like that. Where it's a known location. It's not just where – taking the risk of we hope we can get the drugs at the end.

Q. So let's talk about that. Let's say someone is using an unknowing courier. That person would need to know where the driver was going. Right?

A. That would be a factor, yes.

Q. And if that person was headed home, that person, using an unknowing courier, would want to know that person's specific address. Right?

A. Yes. And, actually, whether the – whether – whether the car is accessible. People park their cars in garages where you can't access the car. Or if it's on a busy street, where it [36] would be unknown – when they tried to take out the drugs, where they could be caught taking off the drugs. So there's many factors. It adds additional risk to the business of losing your product and, therefore, losing your money.

Q. So they would want to know, for example, when that person – that unknowing courier was crossing the border. Right? That would be helpful information?

A. One of the factors involved in that is, yes, basically where they know that the person has a pattern. That they work Monday through Friday and will be crossing the border and going to this one specific location. And that – at that location, they can actually access a vehicle. And it's more where the drugs can be removed quickly, to basically not arouse suspicion.

Q. So someone using an unknowing courier would need access to the vehicle before it was crossed. Right?

A. In order to place the drugs in the vehicle, yes.

Q. And they would need access to the vehicle after it was crossed, to remove the drugs from the vehicle. Right?

A. Yes.

MS. IREDALE: No further questions. Thank you for being here, Agent.

THE COURT: Any further questions, Mr. Olah?

MR. OLAH: Yes. Briefly, your Honor.

REDIRECT EXAMINATION

[37]

BY MR. OLAH:

Q. You noted, at the end there, a risk.

What are some of the ways these organizations address and account for risk?

A. It's that they hire transportation. Where the person that's hired takes the drugs, the cargo, from point A to point B. They know where it's going to be delivered, and they know that when it reaches its destination it can be removed. There's no guessing.

Q. Are GPS devices also used as a risk management tool?

A. Oh, yes. A drug trafficking organization is – is a business. It's not a very trusting business. It's a business about making money. It does not trust its employees. And so the use of basically being able to track where your cargo is, where your drugs – which is money – where it's going.

Q. So a GPS does not mean – is not usually exclusive to the driver. Correct?

A. No.

Q. Are cell phones used in drug trafficking?

A. Yes.

Q. How so? What is their utility?

A. The idea of where the person is, communication. If, say, a drop spot – the – A to B. And B may be – say the – the police are there, or someplace like that. Say it's a parking lot and the police are there. It may get moved to a different [38] location. But, more so, just to keep in contact with the responsible party of the drugs.

Q. And what kind of contacts happen between Mexico and the – if it happens, a crossing of the drugs?

A. Usually it's common for a communication after the crossing. That they know that they've made it through the border.

MR. OLAH: No further questions, your Honor.

THE COURT: Ms. Iredale?

MS. IREDALE: Just one question.

RECROSS-EXAMINATION

BY MS. IREDALE:

Q. We discussed those November and December 2020 unknowing courier schemes.

You are aware that in those unknowing courier schemes, the drug trafficking organizations used GPS devices. Right?

A. Yes, that – I know in some of the schemes with the – where magnets and stuff are imposed, yes, GPS trackers were used.

Q. But these recent schemes did not involve magnets?

A. What were the recent schemes?

Q. One recent scheme, the drug trafficking organization would work with a valet staff at a Tijuana casino. They would get the keys, and then they would place the GPS inside the car to [39] track the load.

A. No, I'm not aware of that one, no.

MS. IREDALE: No further questions. Thank you.

28a

THE COURT: Anything else, Mr. Olah?

MR. OLAH: No, your Honor. Thank you.

THE COURT: All right. Thank you, Agent Flood.
You are free to go.

And would that conclude the Government's
witnesses at this point, Mr. Olah?

MR. OLAH: Yes, your Honor. [39:10]

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APPENDIX D

[01] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, -v- DELILAH GUADALUPE DIAZ, Defendant.	No. 3:20-CR-2546-AJB December 14, 2020 2:23 P.M. San Diego, California
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**TRANSCRIPT OF MOTION IN LIMINE
HEARING**

**BEFORE THE HONORABLE
ANTHONY J. BATTAGLIA
UNITED STATES DISTRICT JUDGE**

TELEPHONIC APPEARANCES:

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by Computer

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[16:21]

Motion 28-6 is the motion to exclude the structure modus operandi-type evidence. And, you know, tentatively, I would deny the motion. It is not unusual, in these courier cases or these border cases, to put a context on how the operation works, in a general sense, for the jury to understand [17] the process, particularly if the suggestion through the defense or an overt pitch for lack of knowledge is made, or the lack of specificity or details. It comes up all the time, and I don't see any reason to exclude it here.

I mean, to the extent that the Agent says there is no such thing as an unknowing courier – I would be surprised if they said that – then you can certainly cross-examine on some of the data that is out there about things that the Government has said or found or experienced. But I think it's all fair context, and supported by the Ninth Circuit in a case of this type.

So I would deny Motion 28-6, but I will let you have any further comment on that, Ms. Iredale.

MS. IREDALE: No, Your Honor. I submit on the briefing. Thank you.

THE COURT: Okay. So that is denied.

28-7 is a little bit the same. I mean, the witnesses typically have the experience, through their work in the field and as case agents, in handling undercover people and all the rest, and can testify as to – and, again, I don't know that it's an exclusive use that anyone is going to say, but the lack or the fact that the courier – well, I'm having a hard time articulating this and the way it typically flows.

But the fact that there is a high value of drugs and it wouldn't be given to an untrusted, unknowing person because [18] of the potential of discovery and so forth – all of that is fair game it's all subject to cross-examination. So I will deny that at this point.

28-8 is the motion to exclude testimony.

MS. IREDALE: I'm sorry, Your Honor. If I could be heard briefly on Number 7.

THE COURT: Yes. Shoot.

MS. IREDALE: Thank you, Your Honor. I brought this up because of the disclosure I received from Special Agent Andrew Flood. He goes farther than I have seen. And he seems to suggest – first of all, his personal experience.

He says “In my personal experience I've never known of an unknowing courier.” He believes – his prior testimony has stated that he believes that blind mules are, quote, mythical creatures who do not exist. I am moving to exclude this type of testimony.

First, one agent's experience – and I don't think that Agent Flood has been at the port for years. So one agent's out-of-date experience with knowing or

unknowing couriers is not relevant. It's unduly prejudicial for him to say "I've never known of it and, by the way, I don't believe in them. I think they are mythical creatures. I think they don't exist." So that is specifically what I'm trying to reference.

THE COURT: Okay. I will let Mr. Olah address that, although Mr. Flood has testified here four or five times in the [19] last two years. Most recently since we started trials in this COVID era, before the last shutdown. He has been around. I've heard him many times.

Mr. Olah, what about this? I have never heard him go to the mythical creature level of discussion, but you tell me. You defend your position here.

MR. OLAH: Nor have I, Your Honor. And I'll note that it sounds like there was a notice referenced and some prior testimony referenced. I can tell you that as the person who drafted and filed the notice, it has been very clear that it's going to be generally unknowing couriers. There are going to be no absolutes here. It seems like a few years back the Ninth Circuit said "Yeah, this kind of testimony – this absolute testimony – shouldn't be used." And the Government intends to abide by that direction.

Agent Flood's anticipated testimony is that they are generally not used, but there is going to be nothing – to my knowledge, I don't expect mystical creatures or any of those other great quotes.

THE COURT: Or an absolute exclusive.

Here is what I will do, Ms. Iredale, because you have good points in here and I want to acknowledge that. I will grant in part and deny in part. I am going

to grant in part to preclude Agent Flood from testifying as to the mythical creature reference or to the idea of exclusivity.

[20] If his testimony is the majority or the most likely, that's his experience. And all that these witnesses can trade on, much like the mechanics, is their experience. And in his case, I know or hear of his work on various task forces, in handling C.I.S., in doing controlled buys, in sitting through hours of wiretaps, in talking with other case agents. Geez, I could almost testify for him, but I won't.

I think he has a foundation within which to say it. And, clearly, he has to admit that nothing is exclusive. And he has to stay within the realms of reasonableness or I will shoot him down in front of the jury.

So we'll exclude the exclusiveness of the opinion that is a concern, and these references. He has never testified that way in my court, so he is not going to do it now. So granted in part and denied in part. [20:15]

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