

No. 23-14

IN THE

Supreme Court of the United States

DELILAH GUADALUPE DIAZ,

Petitioner,

v.

UNITED STATES,

Respondent.

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

**BRIEF OF NATIONAL ASSOCIATION OF FEDERAL
DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus Curiae National Association of Federal Defenders (“NAFD”) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment. NAFD is a nationwide, non-profit, volunteer organization comprised of attorneys working for federal public and community defender organizations authorized under the Criminal Justice Act. A guiding principle of NAFD is to promote the fair administration of justice by appearing as amicus curiae in litigation relating to criminal law issues affecting indigent defendants in federal court. This is such a case. Each year, federal defenders represent thousands of people whom prosecutors charge (and threaten to charge) with importation of illegal drugs in violation of the Controlled Substances Act. In such cases, NAFD and its members have a strong interest in ensuring that the government meets its constitutional burden to prove each element of an offense beyond a reasonable doubt with admissible evidence. It therefore files this brief in support of Petitioner.

¹ Pursuant to Supreme Court Rule 37.6, counsel for *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* made such a monetary contribution.

INTRODUCTION AND SUMMARY OF ARGUMENT

For those who see the drug trade up close, the idea of a “blind mule”—a drug courier who does not know that she is a drug courier—is uncontroversial. The Court need not take defense lawyers’ word for that proposition.

Senior U.S. Circuit Judge Stephen S. Trott: “This isn’t the first time that blind mules have been discovered. I mean, if you’ve done your homework on this case, you know this problem has been around for a long time.”²

The U.S. State Department: “Criminal organizations smuggling drugs into the United States have targeted unsuspecting individuals who regularly cross the border.”³

An Assistant U.S. Attorney: “[T]hese individuals . . . had no knowledge that they were being used by the organization and that marijuana was being placed in their vehicles. Therefore, the Government now believes that [the convicted defendant] is innocent.”⁴

² Oral Argument at 12:11, *United States v. Flores*, 510 F. App’x 594 (9th Cir. 2013) (No. 11-50431).

³ Mexico International Travel Information, U.S. STATE DEPT (Aug. 22, 2023), <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html>.

⁴ Letter from John Murphy, Assistant U.S. Attorney, Western District of Texas (July 28, 2011) (on file with *Amicus*) [hereinafter Murphy Letter].

In fact, as the following pages show, documented and uncontested examples of people unwittingly bringing drugs across the border are legion. Officers find the contraband in trunks, attached to undercarriages, and slipped into aftermarket compartments—all without the drivers' knowledge. And through a network of spotters and readily available GPS devices, smugglers can surreptitiously retrieve the contraband on this side of the border.

Such machinations are worth the trouble. A courier kept in the dark will not demand payment, act nervous during inspections, make off with the loot, or rat out co-conspirators. But it is a harrowing experience for the students, teachers, shift workers, and countless others charged with crimes that they did not commit. As federal judges recognize, at least some of them have been erroneously convicted.

Our members' experiences show that such an injustice is far more likely in California or Arizona than in Texas. And that is so because of the deeply entrenched circuit split at the heart of Petitioner's case.

Under the Ninth Circuit's interpretation of Federal Rule of Evidence 704(b), prosecutors can prove a defendant's knowledge through expert testimony that unwitting couriers are rare, implausible, or even nonexistent in certain circumstances. As trials in the Ninth Circuit demonstrate, such testimony often is the only evidence of knowledge beyond the mere presence of the drugs themselves. Yet that minimal evidence can be insurmountably damning because it comes from an expert backed by the government's imprimatur. To make matters worse, the government's experts often

all but say that there is zero chance that the defendant *in the courtroom* unknowingly imported drugs.

The Ninth Circuit's regime leaves defendants with impossible dilemmas in mounting a defense. Some trial judges, for example, will restrict the prosecution's expert testimony about a typical drug courier's knowledge, but only so long as the defendant does not "open the door" by attempting to disprove his knowledge of the drugs. This is a Hobson's choice distilled: The defendant must either forego poking holes in the government's case or accept all but irrebuttable evidence about his purported scienter.

And in trials where experts *do* generalize about knowledge, defendants—who want any hope of acquittal—effectively must present evidence showing who *really* planted the drugs. That impermissibly shifts the burden of proof from the government to the defense.

Cases tried in the Fifth Circuit demonstrate a better way. They show that the Fifth Circuit's interpretation of Rule 704(b) holds the government to its burden of proof while leaving it ample opportunity to prove that the truly guilty knowingly imported drugs. As NAFD's members can attest, Fifth Circuit prosecutors still obtain many a drug-importation conviction. They simply prove beyond a reasonable doubt that the particular defendant in the particular courtroom really did know about that particular contraband. With modern investigative techniques, that often is easily achieved.

Because of these experiences on each side of the circuit split, *Amicus* urges the Court to honor Rule 704(b)'s text and spirit by holding that federal

prosecutors cannot introduce expert testimony “about” the defendant’s mental state when scienter is an element of the offense. FED. R. EVID. 704(b). That prohibition includes not only explicit opinions but also their functional equivalent, such as generalizations that accuse the defendant in all but name.

ARGUMENT

I. People regularly import drugs without the knowledge that they are doing so.

In 2022, a manager at a customs warehouse in San Diego saw something odd in the parking lot.⁵ A stranger walked up to an employee’s car, opened the trunk, and unloaded objects from that trunk into a nearby SUV.⁶ The manager called the Department of Homeland Security.⁷

A special agent arrived and reviewed the security footage—he saw that the trunk was opened without a key.⁸ The agent went to the parking lot, noted the car was locked, and got down on the ground.⁹ He saw a GPS tracker magnetically attached to the car’s

⁵ DEPT OF HOMELAND SEC., REPORT OF INVESTIGATION: SANTOS ROCHA 2 (2022) (on file with *Amicus*) [hereinafter *Santos Rocha ROI*].

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

frame.¹⁰ The car's owner, meanwhile, "denied any knowledge or involvement . . . and appeared deeply concerned."¹¹ Unlike in many cases across our Nation's southern border, the agent believed the person who was suddenly forced to explain a load of narcotics in his car.¹² The "magnetic mules" had struck again.¹³

Since President Nixon declared the "war on drugs," the government has known that drug traffickers sometimes employ unwitting couriers.¹⁴ But until the past decade, so-called "blind mules" have been treated as a mythical creature in many drug prosecutions.

"At first, their stories sound like borderland smugglers' lies, their defense among the oldest in the book: I didn't do it."¹⁵ Defendants argue that they do not know how the drugs got in the car; the government claims "that blind mules do not exist"; and the jury convicts.¹⁶

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*

¹³ *Id.* at 1.

¹⁴ *See* Oral Argument at 12:43 (Trott, J.), *Flores*, 510 F. App'x 594 (No. 11-50431) ("I saw them back in the '70s and '80s when I was a prosecutor.").

¹⁵ Dane Schiller, *Innocents Duped into Drug Smuggling*, HOUSTON CHRON. (Oct. 4, 2011, 10:01 PM), <https://www.chron.com/news/houston-texas/article/innocents-duped-into-drug-smuggling-2202906.php>.

¹⁶ *See, e.g., Flores*, 510 F. App'x at 595 (affirming such a conviction).

But in 2010, the government started arresting multiple people trying to cross the U.S.-Mexico border into Texas under uncannily similar circumstances.¹⁷ Most of them drove Ford vehicles that contained two duffle bags of marijuana with bound zippers in the trunk.¹⁸

One of those people, a college student who lived in Mexico, went to trial after six months in detention.¹⁹ The jury convicted despite the lack of evidence of the student's knowledge.²⁰ That troubled the senior U.S. district judge who oversaw the trial.²¹ The judge then learned of another case in his district with identical facts.²² After the verdict, he declared that "an injustice ha[d] been done" and dismissed the case.²³ The prosecutor wrote a letter deeming the student factually innocent.²⁴

¹⁷ See Schiller, *supra* note 15.

¹⁸ See Compl. at 8–11, *United States v. Chavez*, No. 3:11-mj-3330 (W.D. Tex. filed July 1, 2011), ECF No. 1 [hereinafter El Paso Compl.].

¹⁹ See *id.* at 9; Schiller, *supra* note 15.

²⁰ El Paso Compl., *supra* note 18, at 9.

²¹ Schiller, *supra* note 15.

²² Emily Smith, *'Blind Mules' Unknowingly Ferry Drugs Across the U.S.-Mexico Border*, CNN (January 24, 2012, 8:36 PM), <https://www.cnn.com/2012/01/23/world/americas/mexico-blind-drug-mules/index.html>.

²³ *Id.*; El Paso Compl., *supra* note 18, at 9.

²⁴ Murphy Letter, *supra*, note 4.

As more cases with similar patterns showed up in the Western District of Texas, the government uncovered a smuggling ring that relied on blind mules, lookouts, GPS trackers, and a locksmith with access to Ford's key database.²⁵ At least two apparently unknowing couriers caught in the scheme pleaded guilty in hope of receiving a lesser sentence.²⁶ It would not be the first time that an innocent person has done so.²⁷ Given the national media attention, blind mules no longer could be dismissed as mythology.

In time, prosecutors and agents grudgingly acknowledged in court that, yes, some couriers really do not know.²⁸ But those acknowledgements varied. A special agent with Homeland Security Investigations testified during a 2023 drug trial that blind mules exist but "are usually a little more rare" than knowing couriers.²⁹ Other times the agents insist such cases are

²⁵ The ringleader pleaded guilty. El Paso Compl., *supra* note 18, at 5–6; Order Accepting Guilty Plea, *United States v. Chavez*, No. 3:12-cr-318 (W.D. Tex. filed May 25, 2012), ECF No. 35.

²⁶ Schiller, *supra* note 15.

²⁷ See, e.g., Hon. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

²⁸ E.g., Kristina Davis, *More 'Blind Mules' Escaping Drug Charges*, SAN DIEGO UNION TRIB. (May 2, 2015, 11:00 AM), <https://www.sandiegouniontribune.com/news/courts/sdut-drug-smuggling-blind-mules-innocent-drugs-2015may02-story.html>.

²⁹ Jury Trial Tr. at 54, *United States v. Villa Curiel*, No. 3:22-cr-1936 (S.D. Cal. filed Aug. 21, 2023), ECF No. 77 [hereinafter *Villa Curiel Tr.*].

“extremely uncommon.”³⁰ Some testify that blind mules purportedly exist, but that they have never seen one.³¹ And still others testify that blind-mule schemes are limited to specific fact patterns, none of which happen to match the case at bar. Indeed, that is what happened to Petitioner.³²

Filings, transcripts, and discovery from prosecutions across districts, however, show that unwitting couriers are more common than most agents acknowledge and are not limited to a few discrete schemes. Rather, they are part of drug traffickers’ ongoing cat-and-mouse game with authorities. As one former federal prosecutor put it: “[I]t is without a doubt true that there are instances every year where people are coming across, bringing drugs, and they do not realize they’re doing it.”³³ Smugglers regularly ensnare otherwise law-abiding people from all walks of life.

A case from Arizona implicated a 95-year-old man crossing the border for dialysis treatment—with 16 pounds of methamphetamine strapped to his

³⁰ Jury Trial Tr. at 17, *United States v. Gurrola-Ortega*, No. 4:15-cr-536 (D. Ariz. filed July 25, 2016), ECF No. 131.

³¹ *E.g.*, Jury Trial Tr., Day 2, at 73, *United States v. Valdez-Puerta*, No. 4:17-cr-636 (D. Ariz. filed Sept. 17, 2018), ECF No. 166 [hereinafter *Valdez-Puerta Tr.*].

³² Pet. 6.

³³ Jennifer Kastner, *San Diego Man Says He Was a ‘Blind Mule’ for a Cartel, Unknowingly Smuggled Drugs*, ABC 10 (Mar. 7, 2019, 6:32 PM) (quoting former federal prosecutor), <https://www.10news.com/news/team-10/san-diego-man-says-he-was-a-blind-mule-for-a-cartel-unknowingly-smuggled-drugs>.

vehicle.³⁴ The El Paso ring ensnared the student mentioned above, a doctor, a fourth-grade teacher, and an employee at an electronics firm.³⁵ “That was the worst day of my life; it was like a nightmare,” the student said of his arrest.³⁶

Drug traffickers rely on a variety of means to trick unsuspecting people to take drugs across the border. In 2012, the government learned of at least five groups that placed “help wanted” ads in Mexican publications offering money to transport vehicles to the United States.³⁷ Similar ads have appeared on Facebook.³⁸ According to the government, “[o]ne recruiter said that . . . the drivers do not know that they are bringing drugs.”³⁹ The government acknowledged 39 such cases in 2011 and early 2012 alone.⁴⁰

³⁴ Curt Prendergast, *‘Despicable’ Drug-Smuggling Ring in Nogales Roped in Innocent Drivers*, ARIZ. DAILY STAR (Sept. 10, 2019), https://tucson.com/news/local/despicable-drug-smuggling-ring-in-nogales-roped-in-innocent-drivers/article_7215e997-07d2-59df-bc63-b664c44a50fb.html.

³⁵ El Paso Compl., *supra* note 18, at 9–11.

³⁶ Schiller, *supra* note 15.

³⁷ DEP’T OF JUST., 2012 DISCLOSURE RE USE OF ADVERTISEMENTS 1 (on file with *Amicus*) [hereinafter ADS MEMO].

³⁸ *Villa Curiel Tr.*, *supra* note 29, at 47.

³⁹ ADS MEMO, *supra* note 37, at 1.

⁴⁰ Sandra Dibble, *U.S. Says Beware of Ads Placed by Drug Traffickers*, SAN DIEGO UNION TRIB. (Apr. 9, 2012, 7:09 PM), <https://sandiegouniontribune.com/sdut-us-agency-warns-against-tijuana-want-ads-placed-dr-2012apr09-htmlstory.html>.

Blind-mule cases became so common that in 2012 the United States government began running an ad in Mexican newspapers: “Warning!” it read.⁴¹ “Don’t be a victim of the smuggler’s trap.”⁴²

There are two systemic reasons that “blind mules” might seem rarer than they really are. For one, it appears that prosecutors *really* do not like to acknowledge them publicly. The U.S. Attorney’s Office in the Southern District of California often gives defendants an extensive packet of discovery on investigations into blind-mule schemes as exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963). The catch: That packet is subject to a protective order. Indeed, such an order appears to have been issued in this case.⁴³

Second, blind-mule schemes are acknowledged only when discovered by law enforcement. But that necessarily provides a skewed sample. By the time the government discovers a scheme, smugglers often have called a new play. As one agent testified, “drug trafficking changes constantly And so law

⁴¹ *Id.*

⁴² *Id.*

⁴³ Following Petitioner’s motion for discovery of “already compiled materials regarding blind courier operations in the government’s possession,” Mot. to Compel at 2, *United States v. Diaz*, No. 3:20-cr-2546 (S.D. Cal. filed Dec. 28, 2021), ECF No. 39, the government responded with a request for a protective order, Joint Mot. for Protective Order at 1, *Diaz*, No. 3:20-cr-2546 (filed Dec. 30, 2021), ECF No. 41. That order followed. Protective Order at 1, *Diaz*, No. 3:20-cr-2546 (filed Jan. 5, 2021), ECF No. 42.

enforcement is a little slow to catch up.”⁴⁴ It thus makes little sense to say that a new case cannot be a blind-mule scheme unless it matches a fact pattern that trafficking organizations likely have abandoned.

Indeed, many cases have no apparent link to known, large schemes, such as the El Paso ring discussed above. To the contrary, many unwitting couriers appear to be one-offs. “[I]t is very common for people to take advantage of their loved ones [and] friends in this business,” a retired DEA agent told a jury in a 2012 prosecution.⁴⁵ In one case, agents found 53 kilograms of marijuana in the tires of a Ford Explorer driven by a United States citizen with her two minor children in tow.⁴⁶ They declined to arrest her after determining that she had been set up by her friend, a Mexican citizen.⁴⁷ The friend later confessed.⁴⁸

In another example, the government dropped charges against a 66-year-old furniture deliveryman who had imported, along with furniture, 11 pounds of heroin and 48 pounds of cocaine.⁴⁹ Months of

⁴⁴ *Valdez-Puerta Tr.*, *supra* note 30, at 53.

⁴⁵ See Appellant’s Opening Br. at 15, *United States v. Diaz-Espinoza*, No. 12-10430 (9th Cir. filed Nov. 18, 2013) (recounting testimony of a former agent) [hereinafter *Diaz-Espinoza Br.*].

⁴⁶ DEPT OF HOMELAND SEC., REPORT OF INVESTIGATION: GONZALEZ 1–2 (2010) (on file with *Amicus*).

⁴⁷ *Id.* at 5–7.

⁴⁸ *Id.* at 7.

⁴⁹ *Davis*, *supra* note 28.

investigation and litigation showed that his car was parked in public places just before crossing, making it “accessible to anyone who walked by.”⁵⁰ In another case, the government declined to prosecute a produce truck driver after agents found, in a compartment under the floor of his semi-trailer, 75 pounds of cocaine and 28 pounds of heroin.⁵¹

There also are cases in which trafficking organizations worked with corrupt Mexican police officers or valet drivers to put drugs in unwitting individuals’ vehicles.⁵² Drugs linked to blind-mule schemes meanwhile have been found in battery packs, in spare tires, and even in projectors used for business trips.⁵³

The logistics can sound complicated. But blind mules offer unrivaled advantages, at least to the smugglers. For one, there is no need to pay someone who does not know that he is working.⁵⁴ Traffickers often pay couriers who know that they are importing drugs thousands of dollars per trip.⁵⁵ Second, someone who does not know they are carrying expensive cargo is

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Jury Trial Tr. at 11, *United States v. Emery*, No. 3:20-cr-1556 (S.D. Cal. filed May 25, 2023), ECF No. 181.

⁵³ *Villa Curiel Tr.*, *supra* note 29, at 54; Davis, *supra* note 28.

⁵⁴ Davis, *supra* note 28.

⁵⁵ *See, e.g., United States v. Rodriguez*, 44 F.4th 1229, 1232 (9th Cir. 2022).

unlikely to steal it.⁵⁶ As the government often points out, even relatively small amounts of drugs can be worth hundreds of thousands of dollars on the street.⁵⁷ Third, an oblivious drug transporter is unlikely to appear nervous at border checkpoints—at least no more so than the average person interacting with stern government agents.⁵⁸ Nervousness, of course, is an oft-cited reason for searching vehicles at the border.⁵⁹ Finally, and above all, it is impossible for someone to snitch against others in a conspiracy of which he has no knowledge.⁶⁰ That is particularly important to the real drug smugglers because couriers are motivated to talk: Substantial sentencing benefits are tethered to providing the government with “all information and evidence the defendant has concerning the offense.” 18 U.S.C. § 3553(f).

Unwitting transporters’ advantages mean that the schemes indeed can be large. This comes into public view when the government prosecutes people who admit to relying on “blind mules.”

Between January 2017 and February 2018, authorities seized 81 kilograms of methamphetamine,

⁵⁶ Davis, *supra* note 28.

⁵⁷ See, e.g., *United States v. Diaz*, 884 F.3d 911, 914 (9th Cir. 2018).

⁵⁸ Davis, *supra* note 28.

⁵⁹ See, e.g., *United States v. Gutierrez-Farias*, 294 F.3d 657, 660 (5th Cir. 2002).

⁶⁰ Davis, *supra* note 28; *Diaz-Espinoza Br.*, *supra* note 45, at 15 (recounting testimony of a former agent at trial).

26 kilograms of pure “ice” methamphetamine, 7.4 kilograms of heroin, and 3.5 kilograms of cocaine from a gang in Arizona that used unwitting transporters to get drugs across the border.⁶¹ In sentencing a ringleader to ten years in prison, the district judge bemoaned the fact that the man before him “had innocent people arrested and charged with trafficking drugs.”⁶² The judge continued: “There may be someone that you guys tracked and put these drugs on that wound up going to prison.”⁶³

Another federal judge in San Diego had the same concern in sentencing participants in the “magnetic mules,” the scheme that ensnared the customs warehouse worker in 2022.⁶⁴

At the sentencing hearing, the judge similarly said it was particularly insidious that the scheme targeted ordinary people who “cross from Mexico just to come to the United States, do their jobs, go back and forth.”⁶⁵ “[T]hat subjected all these people to potentially standing where you’re standing when they’re

⁶¹ Sentencing Hearing Tr. at 25, *United States v. Florez-Enriquez*, No. 4:18-cr-266-6 (D. Ariz. filed Sept. 30, 2019), ECF No. 281.

⁶² *Id.*

⁶³ *Id.* at 26.

⁶⁴ See Sentencing Mem. at 1, *United States v. Santos Rocha*, No. 3:22-cr-1247-CAB-1 (S.D. Cal. filed Mar. 17, 2023), ECF No. 58; *Santos Rocha* ROI, *supra* note 5, at 1.

⁶⁵ Sentencing Hearing Tr. at 11, *Santos Rocha*, No. 3:22-cr-1247-CAB-1 (S.D. Cal. Mar. 24, 2023) (on file with *Amicus*).

completely innocent and *having to in essence prove their innocence*,” the judge said.⁶⁶ She continued, “because it looks so bad for them when a dog alerts at the border and there’s 50 pounds of methamphetamine in their car, and they truly had no idea.”⁶⁷

Our members in the Ninth Circuit have struggled to defend people in that predicament for decades.

II. The Ninth Circuit’s interpretation of Rule 704(b) permits convictions premised solely on inaccurate generalizations.

The Ninth Circuit’s interpretation of Rule 704(b) risks people being convicted without evidence that *they*—rather than a *typical courier*—knew they were trafficking drugs. That is because the Ninth Circuit interprets Rule 704(b) to apply solely to “explicit opinion[s]” about the mental state of the defendant in the courtroom. *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013). And prosecutors have capitalized on this holding to prove defendants’ knowledge through mere generalizations, not individualized evidence.

One need only compare the two trials of Alejandro Sepulveda-Barraza. In 2007, the then-65-year-old Mexican shrimp boat captain pulled up to the port of entry in Nogales, Arizona, in an old Toyota.⁶⁸ The

⁶⁶ *Id.* (emphasis added).

⁶⁷ *Id.*

⁶⁸ Appellant’s Opening Br. at 4, *United States v. Sepulveda-Barraza*, 645 F.3d 1066 (9th Cir. 2011) (No. 09-10362).

Border Patrol agent found him “a little nervous” and “a little friendly,” so referred him for further inspection.⁶⁹ Agents found more than 11 kilograms of cocaine in his sedan’s seat cushions.⁷⁰ The government charged Mr. Sepulveda-Barraza with importing narcotics, and the fisherman maintained his innocence.⁷¹

At the first trial, the government called three agents and a forensic chemist.⁷² Mr. Sepulveda-Barraza, meanwhile, testified that he did not know drugs were in his car and that he had loaned his car to a friend just before driving to the border.⁷³ The jury deadlocked.⁷⁴

At the second trial, the government’s case had a new centerpiece: a special agent with Immigration and

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 4–5.

⁷² *Id.* at 5.

⁷³ *Id.*

⁷⁴ *Id.* at 6.

Customs Enforcement.⁷⁵ From the witness stand, this agent rejected out of hand the suggestion that drug traffickers would use unwitting couriers because it “poses so many problems that it’s just impractical.”⁷⁶ That testimony was a focus of the government’s opening statement and closing argument.⁷⁷ Mr. Sepulveda-Barraza again testified.⁷⁸

⁷⁵ *Id.* at 7. In both trials, the juries heard recorded excerpts of a jail call between Mr. Sepulveda-Barraza and his older brother two days after the arrest. During that call, the older brother chided the 65-year-old fisherman for wanting to be a “narc,” and Mr. Sepulveda-Barraza did not correct him. *See* Gov’t Exhibit List at 1, *United States v. Sepulveda-Barraza*, No. 4:07-cr-1773 (D. Ariz. filed Jan 15, 2009), ECF No. 68. Mr. Sepulveda-Barraza testified that his brother was teasing and sounded drunken. Jury Trial Tr. at 429–30, 455, *Sepulveda-Barraza*, No. 4:07-cr-1773 (filed Feb. 19, 2010), ECF No. 165. Regardless, as the jury’s lack of verdict in the first trial indicated, the recording evidently was too ambiguous to prove knowledge.

⁷⁶ Appellant’s Opening Br. at 9, *Sepulveda-Barraza*, 645 F.3d 1066 (No. 09-10362) (quoting Jury Trial Tr. at 17, *Sepulveda-Barraza*, No. 4:07-cr-1773 (filed Apr. 28, 2009), ECF No. 118).

⁷⁷ *Id.* at 8, 10.

⁷⁸ Because the Ninth Circuit’s interpretation of Rule 704(b) permits defendants to offer in-kind testimony, Mr. Sepulveda-Barraza also called a private investigator, who testified that some drug-trafficking schemes relied on unknowing couriers. *Id.* at 10; Jury Trial Tr. at 367, 404, *Sepulveda-Barraza*, No. 4:07-cr-1773 (filed Feb. 19, 2010), ECF No. 165. Of course, as discussed below, such testimony is no match for a witness with the imprimatur of the government. *Infra* 21–22.

The jury convicted, and the district judge sentenced the 65-year-old to ten years in prison.⁷⁹ The Ninth Circuit affirmed, citing its prior precedents that such testimony is admissible.⁸⁰

Such tales are not uncommon.

Marco Antonio Venegas-Reynoso was a 37-year-old mechanic, welder, father of two, and naturalized United States citizen who lived in Baja.⁸¹ In May 2011, he was convicted of importing 15 kilograms of cocaine stuffed into the spare tire underneath his car.⁸² The evidence of knowledge: a government agent's testimony that, "based upon the information that [he had] gathered from . . . different sources" and "[his] personal experience," a drug courier being unaware of the drugs in his vehicle "*has not happened.*"⁸³

Even the Ninth Circuit expressed "some concerns that [the agent's] testimony ventured close to drawing, in effect, the ultimate conclusion for the jury."⁸⁴ But it

⁷⁹ Appellant's Opening Br. at 11, *Sepulveda-Barraza*, 645 F.3d 1066 (No. 09-10362).

⁸⁰ *Sepulveda-Barraza*, 645 F.3d at 1071–72 (citing *United States v. Murillo*, 255 F.3d 1169, 1177–78 (9th Cir. 2001)).

⁸¹ Appellant's Opening Br. at 5, *United States v. Venegas-Reynoso*, 524 F. App'x 373 (9th Cir. 2013) (No. 11-10536).

⁸² *Id.*

⁸³ Jury Trial Tr. at 10–11, *United States v. Venegas-Reynoso*, No. 2:10-cr-1257 (D. Ariz. filed Aug. 15, 2011), ECF No. 74 (emphasis added).

⁸⁴ *Venegas-Reynoso*, 524 F. App'x at 376.

ruled that the district court did not abuse its discretion.⁸⁵ It meanwhile cited highly circumstantial evidence to suggest that any error was harmless. That included the street value of the cocaine, how the cocaine was hidden,⁸⁶ and that the defendant “did not appear surprised when confronted with information as to the discovered drugs.”⁸⁷

Clemente Valdez-Puerta, a young Mexican citizen with a student visa, was arrested in 2017 on his way to an English class in Arizona after agents found drugs inside a speaker in his trunk.⁸⁸ The government’s purported proof of knowledge was again sparse. It argued that Mr. Valdez-Puerta must have known because (1) he kept looking forward with his hands on the steering wheel during the inspection; (2) it was difficult to remove the drugs from the speaker; and (3) a special agent testified that “[i]n [his] experience working these investigations, I haven’t seen any

⁸⁵ *Id.* at 375–76.

⁸⁶ As discussed above, there are confirmed cases of traffickers hiding drugs in the spare tires of unwitting couriers.

⁸⁷ *Id.*

⁸⁸ Appellant’s Opening Br. at 3, *United States v. Valdez-Puerta*, No. 18-10292 (9th Cir. filed Apr. 5, 2019).

[unwitting couriers] in southern Arizona.”⁸⁹ The jury convicted.⁹⁰

Such testimony offered by federal agents often is insurmountably damning not just because it is unequivocal, or because it goes to an element of the offense, or because it comes from someone deemed an “expert.” It is also damning because it comes from an agent stamped with the “imprimatur of the government.” *United States v. Young*, 470 U.S. 1, 18 (1985). As this Court recognized in another context, such prestige “may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” *Id.* at 18–19.⁹¹

There are no credible alternatives for a defendant to summon for a battle of the experts. Former drug kingpins are unlikely to admit to additional crimes, much less be taken seriously by a jury. Some defense attorneys have called private investigators or retired agents to testify that blind mules, in fact, exist—with

⁸⁹ Appellee’s Answering Br. at 5, 8, 10, *Valdez-Puerta*, No. 18-10292 (9th Cir. filed Dec. 20, 2019).

⁹⁰ Mr. Valdez-Puerta abandoned his appeal on other grounds in exchange for a sentencing agreement with the government. *See* Joint Mot. to Remand for Resentencing, *Valdez-Puerta*, No. 18-10292 (9th Cir. filed Feb. 20, 2020). There was no admission of guilt. *See id.*

⁹¹ *See also* Pretrial Hearing Tr. at 40, *United States v. Yoquigua-Lopez*, No. 3:17-cr-4413 (S.D. Cal. filed Apr. 19, 2018), ECF No. 32 (showing an NAFD member recognize that such testimony is taken “very seriously”).

little success.⁹² That makes sense; a juror is unlikely to take the word of a civilian paid by the defense over that of a sworn officer who takes the stand as part of his duties.

Yet the Ninth Circuit's interpretation of Rule 704(b) gives experts such leeway that certain agents have acknowledged blind mules in one case, only to deny them in another. That is what happened in the 2012 prosecution of Rosa Maria Diaz-Espinoza, a middle-aged Mexican woman with grown children and a new fiancé.⁹³ The government found 20 kilograms of cocaine in her car's gas tank compartment. At trial, the case agent testified that while blind mules are "possible in certain instances, . . . *not in this instance*."⁹⁴ After Ms. Diaz-Espinoza unsuccessfully objected and moved for a mistrial, the agent continued. He testified that, with large quantities of drugs, an unknowing courier "is not something I would call even fathomable."⁹⁵ That jury convicted, too.

Standing alone, that testimony is cause for deep concern. But here is the real kicker: In a similar case just three months prior, the same agent acknowledged that blind mules were, in fact, fathomable.⁹⁶ In that

⁹² See, e.g., *Diaz-Espinoza Br.*, *supra* note 45, at 15; see also NACDL Amicus Br. 23–25 (showing why a civilian expert witness cannot compete with an expert witness who is a sworn officer).

⁹³ *Diaz-Espinoza Br.*, *supra* note 45, at 4.

⁹⁴ *Id.* at 12 (emphasis added).

⁹⁵ *Id.* at 13.

⁹⁶ *Id.* at 14.

case, the agent testified to a debate in his unit about whether a particular case involving a “considerable amount of methamphetamine” relied on an unwitting courier.⁹⁷ He then said, “[t]hat’s an example that I have had in my career of a potential use of an unwitting [courier].”⁹⁸

It is the Ninth Circuit’s rule that allows such inconsistent testimony. That court’s interpretation of Rule 704(b) removes any real restrictions on the opinions that experts express about a defendant’s purported mental state. At least some of its jurists acknowledge as much.⁹⁹

That leeway creates a perverse incentive for the government to call inexperienced “experts” who may be out of step with their more experienced colleagues. After all, the less experience an agent has, the less likely it is that he has encountered a given genus of cases, such as blind mules.

The Ninth Circuit’s application of Rule 704(b) creates additional collateral problems. In San Diego,

⁹⁷ *Id.* (quoting Jury Trial Tr., Day 2, at 25–30, *United States v. Wilson*, No. 4:11-cr-3035 (D. Ariz. filed Apr. 6, 2012), ECF No. 123).

⁹⁸ *Id.* Ms. Diaz-Espinoza abandoned her appeal in exchange for the government’s recommendation of a five-year sentence. Joint Mot. for Remand at 2, *Diaz-Espinoza*, No. 12-10430 (9th Cir. filed Apr. 21, 2014). There was no admission of guilt.

⁹⁹ As one panel put it, the Ninth Circuit’s precedents reduce Rule 704(b) “essentially to a semantic preclusion.” *United States v. Hayat*, 710 F.3d 875, 902 (9th Cir. 2013).

some district judges will bar the government from introducing expert testimony about typical couriers under Federal Rule of Evidence 403. Yet that ruling comes with a catch. The testimony is proscribed only if the defendant does not “open the door” by too forcefully challenging knowledge or by asking witnesses about blind mules.¹⁰⁰

That hamstringing most defenses in a drug prosecution. As a judge in one case put it: “[D]efenses with regard to . . . how you can unlock cars with any number of devices, and things like that, that suggest that third parties were at work in [the defendant’s] absence, doing things to the car, and a full-court press on an unknowing-courier-type defense” all cross the line.¹⁰¹ The defense got the message; it put on a single witness, and no door was opened.¹⁰² The downside: The jury convicted. Other judges do not say before trial how, precisely, a defendant would open the door, leaving them to proceed at their own risk.¹⁰³

If the government’s expert testimony *does* come in, there is yet another problem. Now the defendant faces

¹⁰⁰ *E.g.*, Pretrial Hearing Tr. at 65, *United States v. Kolesin*, No. 3:23-cr-36 (S.D. Cal. filed Oct. 23, 2023), ECF No. 71.

¹⁰¹ Pretrial Hearing Tr. at 25, *United States v. Haro*, No. 3:19-cr-3149 (S.D. Cal. filed Feb. 14, 2020), ECF No. 61.

¹⁰² Defendant’s Witness List, *Haro*, No. 3:19-cr-3149 (filed Jan. 16, 2020), ECF No. 52.

¹⁰³ *See, e.g.*, Pretrial Hearing Tr. at 5–6, *United States v. Enriques Penaran*, No. 3:23-cr-1546 (S.D. Cal. filed Aug. 4, 2023), ECF No. 67.

pressure to prove who *really* planted the drugs. Because if the jury hears that almost all couriers “know” that they are transporting contraband, the question becomes, “Well, how is the defendant an exception?”¹⁰⁴

Defense investigators do not have the power or tools of government agents. And American subpoenas do little good south of the border. The result is case after case in which defendants have no option but to suggest—but not prove—that a friend, lover, spouse, mechanic, or colleague must have planted the drugs when they had access to the car.

Setting aside the logical and practical difficulties, it is impossible to prove that one does not know something. A de facto requirement that the defendant must solve a whodunnit to go free sounds an awful lot like placing the burden of proof on the accused. That, of course, is not how criminal trials work in the United States: The Fifth Amendment demands that the government prove its case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

Yet that is how trials seem to work for people accused of trafficking drugs in the Ninth Circuit. The government’s agents can take the stand and make sweeping and inaccurate representations about the mental state of all—or virtually all—drug couriers. Even if agents no longer say that blind mules do not ever exist, they all but say that a blind mule cannot be

¹⁰⁴ See, e.g., Sentencing Hearing Tr. at 11, *Santos Rocha*, No. 3:22-cr-1247-CAB-1.

sitting at the defense table. That contravenes Rule 704(b)'s text and spirit.

III. The Fifth Circuit's interpretation of Rule 704(b) properly requires prosecutors to prove knowledge without relying on expert generalizations, a burden often met.

The Fifth Circuit, by contrast, shows that it is possible to guarantee Rule 704(b)'s protections while giving the government every tool it needs to successfully prosecute the case. For two decades, that court repeatedly has held that Rule 704(b) proscribes not just explicit opinions about the defendant's mental state, but their "functional equivalent," too. *United States v. Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002). That includes testimony "that drug couriers 'usually' know that they are transporting drugs." *United States v. Lara*, 23 F.4th 459, 476–77 (5th Cir. 2022). Thus, much of the testimony from the Ninth Circuit cases discussed above could not be said in front of a federal jury in the Fifth Circuit.

The Fifth Circuit's interpretation of 704(b) has not made Texas a lawless zone in which drug traffickers act with impunity. Far from it. District courts in Texas often lead the nation in drug-trafficking convictions.¹⁰⁵ And that is because the government there proves guilt

¹⁰⁵ U.S. SENTENCING COMM'N, QUICK FACTS: DRUG TRAFFICKING OFFENSES 1 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Drug_Trafficking_FY22.pdf.

by gathering evidence about a *specific* defendant's knowledge.¹⁰⁶

The two trials of Saul Perez-Lopez provide a perfect example. In 2010, a jury convicted Mr. Perez-Lopez of trafficking 982 kilograms of marijuana hidden in a truck full of watermelons.¹⁰⁷ Whether that trafficking was *knowing* was the primary issue at trial.¹⁰⁸ Prosecutors elicited testimony from an agent that smugglers do not place large amounts of drugs in vehicles without the drivers' knowledge.¹⁰⁹ The agent doubled down on cross-examination, testifying that he

¹⁰⁶ Notably, drug-importation cases are overwhelmingly resolved with a guilty plea. U.S. COURTS, U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND OFFENSE 2 (2023). That is because, in *Amicus's* experience, defendants with flimsy stories and damning circumstantial evidence are incentivized to accept plea offers to avoid a “trial tax” of a longer sentence. See Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 409 (2021). Thus, the cases that proceed to trial—in either circuit—often are the rare subset of genuinely close cases where members' clients maintain innocence. Thus, forcing the Ninth Circuit to follow the Fifth Circuit's regime will not cause a large uptick in the number of trials there.

¹⁰⁷ Gov't Resp. in Opp'n at 1, *United States v. Perez-Lopez*, No. 2:10-cr-613 (S.D. Tex. filed Sept. 30, 2010), ECF No. 41 [hereinafter Gov't Resp.].

¹⁰⁸ Mot. for a New Trial at 1, *Perez-Lopez*, No. 2:10-cr-613 (S.D. Tex. filed Aug. 9, 2010), ECF No. 29 [hereinafter Mot. for New Trial].

¹⁰⁹ Gov't Resp., *supra* note 107, at 2.

had not “run across a case yet” that would lead him to believe otherwise.¹¹⁰

In a motion for a new trial, the defendant noted that there were two problems with that testimony. First, it violated Rule 704(b).¹¹¹ Second, it bordered on perjury.¹¹² The agent apparently knew that his agency was investigating a trucking company that hired unwitting drivers to transport drugs.¹¹³ The judge granted a new trial.

At the second trial, the agent did not testify about unwitting couriers. Instead, the prosecution focused on facts about Mr. Perez-Lopez. Those included his nervousness and the sheer size of the load, as well as

(1) the large gap in time from the time that the watermelons were loaded and the time that he was stopped at the checkpoint . . . ; (2) his statement to a truck stop attendant *after the watermelons were loaded* that he did not have time to get his oil changed because he “had to leave for a load”; and (3) the loading and unloading process for the watermelons and the shippers’ testimony that they would

¹¹⁰ *Id.*

¹¹¹ Mot. for New Trial, *supra* note 108, at 2–3.

¹¹² *See id.* at 3.

¹¹³ *Id.* at 1.

have reported any bundles of marijuana to the authorities.¹¹⁴

The jury convicted, and the Fifth Circuit affirmed.¹¹⁵

This is just one of many cases where defendants are convicted even after the district court excludes testimony about a typical courier's mental state.¹¹⁶ Indeed, prosecutors in the Fifth Circuit now often concede that it is impermissible to premise guilt "on similarities between defendants and a profile."¹¹⁷ They still obtain convictions.¹¹⁸

Nor are all drug-trafficking convictions in the Fifth Circuit limited to cases featuring massive quantities of drugs. Knowledge was a key issue in a recent case involving heroin inside a DVD player.¹¹⁹ But the jury still convicted (and the Fifth Circuit still affirmed)

¹¹⁴ *United States v. Perez-Lopez*, 452 F. App'x 527, 528 (5th Cir. 2011) (emphasis added).

¹¹⁵ *Id.*

¹¹⁶ See, e.g., Jury Trial Tr. at 112, *United States v. Vargas*, No. 5:15-cr-4 (S.D. Tex. filed Sept. 19, 2015), ECF No. 55; Jury Trial Tr. at 196, *United States v. Rodriguez-Garcia*, No. 5:15-cr-164 (S.D. Tex. filed Dec. 18, 2015), ECF No. 97.

¹¹⁷ E.g., Gov't Resp. at 2, *United States v. Martinez-Morgado*, No. 7:14-cr-1914 (S.D. Tex. filed July 31, 2015), ECF No. 31.

¹¹⁸ See, e.g., Jury Verdict, *Martinez-Morgado*, No. 7:14-cr-1914 (filed Aug. 11, 2015), ECF No. 38.

¹¹⁹ Jury Trial Tr. at 200, *United States v. Aguirre-Rivera*, No. 3:19-cr-926 (W.D. Tex. filed Aug. 17, 2020), ECF No. 121.

without anyone violating Rule 704(b).¹²⁰ Often, the government instead relies on the wealth of evidence contained in defendants' cell phones.¹²¹

Furthermore, prosecutors in the Fifth Circuit can still rely on experts to talk about the mechanics of drug trafficking—so long as they do not “opine[] about [the defendant]’s mental state based merely on evidence of how [drug traffickers] generally operate.” *United States v. Pierre*, —F.4th—, No. 22-20515, 2023 WL 8541406, at *3 (5th Cir. Dec. 11, 2023); *United States v. Medeles-Cab*, 754 F.3d 316, 321 (5th Cir. 2014). In the recent *Pierre* case, the Fifth Circuit affirmed a drug-trafficking conviction because “there was ample direct evidence from which a jury could have inferred [the defendant]’s guilty knowledge.” 2023 WL 8541406, at *3. In other words, one cannot say with a straight face that it is too hard to convict a drug trafficker in the Fifth Circuit.

What the Fifth Circuit’s balanced approach does is spare people from convictions based on law enforcement’s sweeping generalizations. Our members report, for example, that prosecutors and judges in the

¹²⁰ See *United States v. Aguirre-Rivera*, 8 F.4th 405, 408 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 807 (2022).

¹²¹ See, e.g., Hearing Tr. at 6–8, *United States v. Medeles-Cab*, No. 5:12-cr-996 (S.D. Tex. filed May 16, 2013), ECF No. 96; *United States v. Lyons*, 697 F. App’x 305, 306 (5th Cir. 2017).

Fifth Circuit routinely dismiss cases when there is no individualized evidence of knowledge.¹²²

And, sometimes, when the government is unable to offer evidence that proves beyond a reasonable doubt that a particular person *knowingly* trafficked drugs, she is acquitted.¹²³ That, after all, is how criminal trials are supposed to work and what both the Rules of Evidence and Constitution require.

* * *

The government knows that some drug transporters have no idea they are participating in transnational crime. For real smugglers, the use of “blind mules” has been and will remain a key weapon in the constant effort to evade authorities.

NAFD does not suggest that every person who transports drugs is innocent. Nor do we suggest that all who claim to be “blind mules” must be believed. Indeed, many members’ clients admit that they have been paid to bring drugs across the border. But no matter on which side of the line a person falls, the government must comply with the Federal Rules of Evidence and its burden to prove every element of an offense beyond a reasonable doubt. That is not just

¹²² See, e.g., Order of Dismissal at 1, *United States v. Rojas-Ruiz*, No. 1:16-mj-238 (S.D. Tex. filed Mar. 11, 2016); Mot. to Dismiss at 1, *United States v. Ramirez-Rodriguez*, No. 5:15-mj-47 (S.D. Tex. filed Feb. 6, 2015), ECF No. 8.

¹²³ See, e.g., Verdict Form, *United States v. Juarez-Bedolla*, No. 2:12-cr-769 (S.D. Tex. filed Jan. 15, 2013) (finding Ms. Juarez-Bedolla not guilty of knowingly importing heroin).

required by Rule 704(b), but is a basic principle of due process that this Court has long recognized. *See In re Winship*, 397 U.S. at 363–64 (“[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.”).

For more than twenty years, the Fifth Circuit has demonstrated a way to honor those principles while still giving prosecutors the tools they need to prove that the truly guilty are, in fact, guilty. It is time to put the Ninth Circuit on the same path.

CONCLUSION

For all these reasons, this Court should reverse.

Respectfully submitted,

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