No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FERNANDO LOPEZ-ARMENTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where the sole defense raised to a criminal charge is guilt of a lesser included offense, does the right to a present a defense rooted in the Fifth and Sixth Amendments require a trial court to grant a request to instruct on that defense, where it is consistent with the law and supported by the evidence?

STATEMENT OF RELATED CASES

United States of America v. Fernando Lopez-Armenta, No. 2:21-cr-00132-JCC, U.S. District Court for Western Washington. Judgment entered April 6, 2023.

* *United States of America v. Fernando Lopez-Armenta*, No. 23-618, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 14, 2024.

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INTRODUCTION

Petitioner was convicted of possession of a controlled substance for distribution following the trial court's refusal to instruct the jury on his sole defense, which was that he was guilty of the lesser included offense of simple possession of a controlled substance -- a defense that was consistent with the law and supported by the evidence. The court of appeal's affirmance of that decision demonstrates the need for this Court to resolve the longstanding conflict among circuit courts of appeals on whether there are circumstances under which the Constitution mandates instruction on a lesser included offense in non-capital cases.

In *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980), citing the heightened need for certainty the jury would give full force to the Constitution's beyond a reasonable doubt proof requirement when a life is at stake, this Court held that a request for instruction on a lesser included offense is constitutionally mandated where a capital offense is charged. It appears only two circuit courts of appeals have held the Constitution requires such instruction in non-capital cases.

In *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027-1028 (3d Cir. 1988) the Third Circuit Court of Appeals extended the mandate for instruction on lesser included offenses to non-capital cases based on the determination that the due process guarantee mandated the same level of certainty the beyond a reasonable doubt standard was being applied in these cases as in capital cases. The Sixth Circuit also found that issuance of a lesser included

offense instruction in a non-capital case was constitutionally required in *United States v. Monger*, 185 F.3d 574, 578 (6th Cir. 1999).

However, *Monger* turned less on the need for assurance the jury would fully apply the beyond a reasonable doubt standard than on the need for the defendant to have the opportunity to have the jury fairly consider his defense. *Ibid*. Thus, the *Monger* court, noting the defendant had admitted commission of the lesser included offense, and defended solely on that ground, persuasively analogized the court's refusal to instruct on the lesser included offense to failing to instruct the jury on all the elements of the charge, i.e. to a structural error. *Ibid*.

Petitioner, whose circumstances mirrored those of the defendant in *Monger*, submits that, at least in cases in which the sole defense raised is guilt of the lesser included offense, and that defense is consistent with the law and supported by the evidence, a trial court's denial of a request for instruction thereon effectively denies the defendant the opportunity to present his defense to the jury, and thus is irreconcilable with the Constitution's guarantee of the right to present a defense. Particularly since a defense predicated on admission of the lesser included offense is well recognized, this Court should grant review in this case to resolve the conflict among the circuits and ensure uncertainty on this question does not continue to cause criminal defendants to be denied their fundamental right to present a defense in the future.

OPINIONS BELOW

The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit in *United States of America v. Fernando Lopez-Armenta*, docket number 23-618*,* affirming the district court's judgment and filed on August 14, 2024, is attached in the Appendix A at App. 1; it is unreported and available at 2024 U.S. App. LEXIS 20769.

The unpublished order of the United States Court of Appeals for the Ninth Circuit in *United States of America v. Fernando Lopez-Armenta*, docket number 23-618*,* denying petitioner's petition for rehearing and for rehearing en banc and filed September 18, 2024, is attached in the Appendix B at App. 5; it is unreported.

JURISDICTION

The court of appeals entered judgment on August 14, 2024. App. 1. Petitioner filed a timely petition for rehearing and for rehearing en banc on August 25, 2024. (Docket # 51), which the court of appeals denied on September 18, 2024. App. 5. In its order of December 18, 2024 this Court granted petitioner's motion to extend time to file this petition for writ of certiorari until February 15, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution, in relevant part, provides "[n]o person shall be… deprived of life, liberty, or property without due process of law..."

The Sixth Amendment of the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Procedural History

In a superseding indictment filed on August 24, 2022 Mr. Lopez-Armenta was charged with one count of possession of a controlled substance (fentanyl) with intent to distribute. Docket # 11.1 at 125-126; 21 U.S.C. § 841 (a)(1). He also was charged with one count of carrying a firearm (a Ruger .45 semi-automatic pistol) in commission of a drug trafficking crime. 18 U.S.C. § 924 (c)(1)(A)(i). Docket # 11.1 at 125-126.

As to the charge of possession of fentanyl with intent to distribute, the indictment alleged it involved 400 grams or more of a mixture or substance containing a detectable amount of fentanyl. Docket # 11.1 at 125; 21 U.S.C. § 841 (b)(1)(A).

Petitioner requested instruction on the lesser included offense of possession of a controlled substance. Docket # 11.1 at 113-121, 124. The trial court denied the request. Docket # 11.1 at 112.

The jury convicted petitioner of both counts on November 22, 2022. Docket # 11.1 at 13-14. It also found true the allegation that the possession of fentanyl with intent to distribute involved 400 grams or more of a mixture or substance containing a detectable amount of fentanyl. Docket # 11.1 at 14.

On April 6, 2023 the court imposed a sentence of 120 months prison on the count of possession of a controlled substance with intent to distribute and 60 months prison on the count of possession of a firearm in commission of a drug trafficking crime, to run consecutively.[1] Docket # 11.1 at 4. Timely notice of appeal was filed on April 7, 2023. Docket # 11.1 at 130.

On August 14, 2024 the court of appeals affirmed the judgment of the district court. App. 4. Petitioner filed a timely petition for rehearing and for rehearing en banc on August 25, 2024 (Docket # 51), which the court of appeals denied on September 18, 2024. App. 5. In its order of December 18, 2024 this Court granted petitioner's motion to extend time to file this petition for writ of certiorari until February 15, 2025.

1. This sentence did not reflect the judgment of the trial court, but rather the legal mandatory minimum. Docket # 11.1 at 12. In the judgment of the trial court, the 15 year minimum sentence was "obscene" and the court believed an appropriate sentence would have been 84 months to 96 months. Docket # 11.1 at 11-12. The Assistant U.S. Attorney agreed that the court's assessment of the appropriate sentence, absent the mandatory minimum, was reasonable. Docket # 11.1 at 11.

B. Statement of Facts

Homeland Security Agent Rory McPherson testified that the investigation in this case began as a result of a confidential informant advising Homeland Security that he was in touch with a narcotics trafficker in Arizona who professed to be able to provide large quantities of fentanyl in Washington. Docket # 11.1 at 27. McPherson advised the informant to try to make a deal with the trafficker. Docket # 11.1 at 30.

McPherson said the informant had worked as such for his agency on hundreds of cases for about ten years, and had received a total of approximately $500,000 compensation for that work. Docket # 11.1 at 28-29. He also had worked as an informant in about 29 cases for the Drug Enforcement Administration and had received about $53,000 compensation for that work. Docket # 11.1 at 29. The amount of drugs seized may be a factor in determining the amount of the informant's compensation. Docket # 11.1 at 45. The incentive for his work in this case was $4,000. Docket # 11.1 at 29.

The confidential informant testified that the drug trafficker who had contacted him told him that he had a person in Seattle who could provide the informant with 10,000 fentanyl pills, at $4.50 per pill.[2] Docket # 11.1 at 87, 89-90. Following that discussion

2. The phone calls between the informant and the trafficker were recorded, and transcripts thereof, including English translations from the Spanish, were admitted in evidence. Docket # 11.1 at 15-16.

the informant received a telephone call from Defendant Lopez-Armenta, who said that he had been directed to contact the informant concerning his need for fentanyl pills.[3] Docket # 11.1 at 91.

Lopez-Armenta stated he wished to meet in Federal Way, Washington and the informant stated that, pursuant to instructions from federal agents, he chose the Home Depot in Federal Way. Docket # 11.1 at 92. On August 4, 2021 the confidential informant drove to the Home Depot in Federal Way and parked in the spot to which the agents directed him; he waited there 30-45 minutes for Lopez-Armenta. Docket # 11.1 at 43, 92.

Agent McPherson stated that prior to the informant's going to the Home Depot, Homeland Security Special Agent Clammer, with whom McPherson was working on the case, and a state trooper met with the informant about 1/2 mile from the Home Depot. Docket # 11.1 at 31-32. There they briefed the informant, and McPherson and other agents searched the informant and his car and verified that he had no money or contraband. Docket # 11.1 at 32-33. The informant was to be monitored during the Home Depot meeting by audio and text. Docket # 11.1 at 33.

3. The phone calls between the informant and Lopez-Armenta also were recorded and transcripts of these Spanish language communications with English translations also were admitted in evidence. Docket # 11.1 at 15-16.

When their meeting with the informant concluded, agents drove behind the informant to verify he made no stops on the way to the Home Depot. Docket # 11.1 at 34. After the informant had parked at Home Depot, Agents MacPherson and Clammer parked about 100-150 feet away to a point from which MacPherson was able to observe the informant the entire time. Docket # 11.1 at 35-37.

Once Lopez-Armenta arrived, the informant stated that he approached defendant's Cherokee jeep and opened the passenger side door. Docket # 11.1 at 93. Lopez-Armenta showed him a box containing about 10,000 pills. Docket # 11.1 at 93. He also adjusted his shirt to display a gun. Docket # 11.1 at 93-94. The informant texted "gun, gun, gun" to the agents. Docket # 11.1 at 94. A minute later, he texted "we good … I see it," meaning he had seen the drugs the agents had expected him to see. Docket # 11.1 at 106-107.

The informant suggested he place the box in his car, and Lopez-Armenta agreed; the informant then took the box of pills and placed them on the back seat of his car. Docket # 11.1 at 94-95.

Moments after he had taken the pills, several agents appeared. Docket # 11.1 at 96. Lopez-Armenta then grabbed his gun, exited the jeep and pointed the gun towards the informant and the agents. Docket # 11.1 at 96-97. MacPherson then approached Lopez-

Armenta, who then dropped his gun on the hood of his jeep and put his hands up. Docket # 11.1 at 40-41. MacPherson then ordered Lopez-Armenta to the ground. Docket # 11.1 at 41. Lopez-Armenta complied and McPherson handcuffed him. Docket # 11.1 at 41.

DEA Special Agent Daniel Olson testified that after he was Mirandized, Lopez-Armenta stated that someone in Mexico had asked him to deliver a box to a person in Federal Way. Docket # 11.1 at 84. He said that he picked up the box in SeaTac, Washington contacted a person at a telephone number that was given to him, and then delivered the box to a person in Federal Way. Docket # 11.1 at 84. He repeatedly denied knowing the contents of the box. Docket # 11.1 at 84. Lopez-Armenta did state there were pills on the driver's side door of the jeep in which he had arrived. Docket # 11.1 at 42.

Police recovered approximately a box from the informant's car containing approximately 9,900 pills, weighing a total of approximately 1,090 grams. Docket # 11.1 at 57-58. Radhiyah Himawan, a forensic chemist at DEA, tested a random sample of 9 of the pills, and found they all contained fentanyl. Docket # 11.1 at 58-60. Applying a DEA authorized statistical protocol, Himawan represented that there was a 95% probability that at least 70% of the 9,900 pills contained fentanyl. Docket # 11.1 at 58-61.

A container holding 3,994 pills, whose weight was approximately 430 grams, was recovered from Lopez Armenta's jeep. Docket # 11.1 at 62-64. Some of those pills were green and some were blue. Docket # 11.1 at 63. Himawan tested 9 of the green pills and 9 of the blue pills and determined all the pills contained fentanyl. Docket # 11.1 at 64-65. Applying the DEA authorized statistical protocol, Himawan determined here was a 95% probability that at least 70% of the 3,994 pills contained fentanyl. Docket # 11.1 at 64.

FBI Special Agent Shawna McCann testified that 14,000 fentanyl pills reflects the quantity associated with a lower or middle level distributor of the drug. Docket # 11.1 at 78-79. In August 2021 buying in bulk, fentanyl pills cost $5 to $7 per pill. Docket # 11.1 at 81-82. Drug users typically do not keep large quantities of fentanyl. Docket # 11.1 at 80. McCann also stated that narcotics traffickers sometimes use narcotics, and that a user could consume 900 pills per month. Docket # 11.1 at 83.

A fingerprint from Lopez-Armenta was recovered from wrapping on the drugs found in his jeep. Docket # 11.1 at 74-77. The only print recovered from the container of drugs found in the informant's car belonged to Drug Enforcement Administration Special Agent Parker. Docket # 11.1 at 49.

Neither of the two written reports of the arrest, that of Agent Parker nor that of Agent Clammer, stated that Lopez-Armenta had given a box to the informant or that he

had moved a box to his car. Docket # 11.1 at 52-53, 108-108. Agent Parker stated that was an important detail that belonged in the report. Docket # 11.1 at 53.

REASONS FOR GRANTING THE PETITION

I. THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS CONCERNING A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO INSTRUCTION ON A LESSER INCLUDED OFFENSE MUST BE RESOLVED; ABSENT THE INSTRUCTION, WHERE THE SOLE DEFENSE IS GUILT OF THE LESSER OFFENSE, THE RIGHT TO PRESENT A DEFENSE BECOMES "EMPTY"

A. The Circuit Courts of Appeals Which Permit a Trial Court to Refuse a Defense Request to Instruct on a Lesser Included Offense, Where that Is the Only Defense Raised, and Where The Defense Is Consistent With the Law and There Is Evidence to Support It, Are Permitting Defendants in Such Cases to Be Tried In Violation of Their Right to Present a Defense

Although the sole defense raised in this case to the charge of possession of a controlled substance with the intent to distribute was that the defendant was guilty only of the lesser included offense of simple possession of a controlled substance, the court of appeals held the trial court was not obligated to instruct the jury on that defense:

> a defendant is entitled to an instruction concerning his theory of the case if it is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense. That rule is not applicable here, because it concerns actual defenses or theories that defendants present. Rather the specific rule for lesser-included offenses governs.
>
> App. 2 n. 1 **(**internal quotes and citation omitted).

Faced with the same scenario in *United States v. Monger*, *supra*, 185 F.3d at 578, the Sixth Circuit Court of Appeals took the opposite position. The *Monger* court explained that since the defendant had admitted he was guilty of the lesser included offense of simple possession of a controlled substance, and defended solely on the ground he was not guilty of the charged offense of possession of a controlled substance for distribution, absent instruction on the lesser included offense, the jury was required either to acquit Monger, knowing he was guilty of possession, or to convict him of possession with intent to distribute, even though based on the evidence, it was possible one of the elements of that offense remained in doubt. *Id*. at 578. Given that under these circumstances "'the jury is likely to resolve its doubts in favor of conviction,'" and that it was reasonably possible Monger's jury had done just that, the *Monger* court held omission of the instruction infected the entire trial process and amounted to a structural error. *Ibid*. (quoting *Keeble v. United States,* 412 U.S. 205, 212-213 (1973)).

This Court has determined that instruction on a lesser included offense is constitutionally mandated where a capital offense is charged, based on the heightened need for certainty when a life is at stake. *Beck v. Alabama*, *supra*, 447 U.S. at 637-638. However, it has not applied this requirement to non capital cases. Several circuit courts of appeals have declined to hold the constitutional mandate for instruction on lesser included offenses applies to non-capital cases. *See, e.g., Bonner v. Henderson,* 517 F.2d 135, 136 (5th Cir. 1975); *Nichols v. Gagnon*, 710 F.2d 1267, 1271-1272 (7th Cir. 1983);

Windham v. Merkel, 163 F.3d 1092, 1105-1106 (9th Cir. 1998); *Perry v. Smith,* 810 F.2d 1078, 1080 (11th Cir. 1987).

The Third Circuit Court of Appeals is the only circuit court of appeals other than the Sixth Circuit to have held that in a non-capital case, the Constitution mandates instruction on a lesser included offense, where supported by the law and evidence. *Vujosevic v. Rafferty*, *supra*, 844 F.2d at 1027. However, the Third Circuit in *Vujosevic,* like this Court in *Beck,* based its holding on the determination that the diminished accuracy of factfinding resulting from the omission of such instruction was irreconcilable with the due process mandate that convictions be supported by a finding of guilt beyond a reasonable doubt. *Ibid*.

The question posed here and in *Monger* is quite different. It is, rather, where the only theory the defense presents to the jury is guilt of a lesser included offense, which is only a partial defense, and that theory is consistent with the law and based in the evidence, is granting a request for instruction on the lesser included offense mandated by the constitutional right to present a defense? While this Court has not addressed the question of whether the Constitution requires instruction on the theory of the defense, even where it constitutes a complete defense to the charge,[4] several circuit courts of

4. In *Mathews v. United States*, 485 U.S. 58, 62-63 (1988), in affirming the right of a defendant to an instruction on entrapment, where supported by the evidence, this court did state that "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." However, the Court did not base its holding on the Constitution.

appeals have held that a refusal to instruct on a complete defense that is consistent with the law and supported by the evidence violates the constitutional right to present a defense.[5] *See, e.g. Davis v. Strack*, 270 F.3d 111, 131 (2nd Cir. 2001) (refusal to instruct on justifiable homicide deprived the defendant entirely of his defense, insured his conviction and violated the due process guarantee); *United States v. Hicks*, 748 F.2d 854, 857-858 (4th Cir. 1984) (refusal to instruct on alibi defense violated defendant's constitutional right to have the issue submitted to the jury); *Taylor v. Withrow*, 288 F.3d 846, 851-852 (6th Cir. 2002) (refusal to instruct on self-defense rendered right to present a defense "meaningless"); *Tyson v. Trigg*, 50 F.3d 436, 447-448 (7th Cir. 1995) (denial of instruction on defense of reasonable mistake rendered constitutional right to present witnesses in support of the defense "empty"); *United States ex. rel. Means v. Solem*, 646 F.2d 322, 332 (8th Cir. 1980) (refusal to instruct on self-defense and defense of others violated constitutional right to a fair trial); *United States v. Escobar de Bright*, 742 F.2d 1196, 1201-1202 (9th Cir. 1984) (refusal to instruct on defense that conspiring with a government agent is not "conspiracy" amounted to structural due process violation, since it prevented the jury from considering the defendant's defense).

In addition to resolving a disagreement among the Circuit Courts of Appeals, in deciding this case the court will provide guidance on a question that regularly arises,

5. Petitioner has not been able to locate cases whose holdings squarely address this question in the First, Third, Fifth, Tenth, Eleventh and D.C. Circuit Courts of Appeals.

since admitting guilt to a lesser included offense as part of a strategy of defending against a more serious charge is a well-recognized trial strategy. *See, e.g., Underwood v. Clark,* 939 F.2d 473, 474 (7th Cir. 1991); *Lingar v. Bowersox,* 176 F.3d 453, 459 (8th Cir. 1999). Moreover, petitioner submits that in such cases, where consistent with the law and supported by the evidence, denial of a request to instruct on the lesser included offense does, as the Sixth Circuit observed in the case of refusing instruction on a complete defense, render the right to present a defense "meaningless." *See Taylor v. Withrow*, *supra*, 288 F.3d at 852.

B. Simple Possession of a Controlled Substance Is a Lesser Included Offense of Possession of a Controlled Substance for Distribution, and the Jury Could Have Found Petitioner Was Guilty of the Former, While Harboring Reasonable Doubt About the Latter

To be entitled to instruction on a defense supported by the law, the evidence supporting the defense must be sufficient to allow a jury to rationally sustain it. *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007); *see also Mathews v. United States*, 485 U.S. 58, 63 (1988).

A lesser included offense is an offense, whose elements are a subset of the charged offense. *See Brown v. Ohio,* 432 U.S. 161, 167-168 (1977). Possession of a controlled substance (21 U.S.C. 844 (a)) is a lesser included offense of possession of a controlled substance with intent to distribute (21 U.S.C. § 841 (a)(1)), since the elements of the former are a subset of the elements of the latter. *See United States v. Powell*, 932 F.2d

1337, 1341-1342 (9th Cir. 1991). Thus, for a jury to rationally sustain a defense that the defendant is guilty of simple possession of a controlled substance, but not guilty of possession of a controlled substance to distribute, there must be evidence which, if credited, would prove the defendant committed the lesser offense that did not rationally compel the jury to find the defendant also was guilty of the charged offense. *See United States v. Kayser*, *supra*, 488 F.3d at 1076.

In this case the fentanyl alleged to have belonged to Lopez-Armenta was recovered from two different places. The larger quantity, approximately 9,900 pills weighing approximately 1,090 grams, was recovered from the car of the informant. Docket # 11.1 at 57.

A considerably smaller quantity, approximately, 3,994 pills, weighing approximately 430 grams, was recovered from petitioner's jeep. Docket # 11.1 at 63-64. The prosecution's expert testified that a person using fentanyl could consume as many as 900 pills a month. Docket # 11.1 at 83. Based on that assumption, the fentanyl recovered from the petitioner's jeep would have amounted to slightly more than a four month supply of the drug. While the prosecution's expert testified that it was not typical for users to stockpile large supplies of fentanyl, she did not testify that users do not occasionally possess the quantities here in issue for personal use. Docket # 11.1 at 80. The government thereby failed to establish it would be unreasonable to believe Lopez-

Armenta had possessed the drugs found in his jeep for personal use. C*f. Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (failure to produce evidence that "would have elucidated a fact at issue permits an inference" such evidence would have exposed facts unfavorable to the party) (citing 2 *Wigmore on Evidence*, § 285 at 192 [Chadbourn rev. 1979]). Accordingly, had the jury doubted Lopez-Armenta possessed the fentanyl found in the informant's car in addition to that found in his jeep, and found only that he possessed the fentanyl recovered from his jeep, it reasonably could have doubted he possessed the fentanyl for any purpose other than for personal use. *Cf. United States v. Espinosa*, 827 F.2d 604, 615 (9th Cir. 1987) ($18-$20 million dollars worth of cocaine could not have been possessed for personal use).

There was ample basis for such a finding. Lopez-Armenta's possession of the fentanyl recovered from his jeep was supported by four highly probative and undisputed facts that did not support his possession of the fentanyl recovered from the informant's car: to wit: 1) his express admission that he possessed that fentanyl; 2) that it was recovered from the vehicle he had been observed driving moments prior to the recovery of the fentanyl; 3) that it was recovered from the location in the jeep in which he told police it was located; and 4) that his fingerprint was recovered from the wrap surrounding the fentanyl recovered from the jeep. Docket # 11.1 at 42, 74-77.

Conversely, there was no express admission by petitioner that he had possessed the fentanyl recovered from the informant's car, it was not recovered from a vehicle in which he had been observed, he disclosed no information concerning its location and no fingerprint nor DNA was recovered from its container that linked to him. Moreover, while the prosecution's theory had been that the fentanyl recovered from the informant's car had been moved by the informant from petitioner's jeep immediately prior to the officers commencing petitioner's arrest, the only unambiguous evidence of this contention was the testimony of the confidential informant. Docket # 11.1 at 94-96.

His credibility was questionable for several reasons. First, he was a convicted drug trafficker. Docket # 11.1 at 86. Second, he had a financial interest in the case, having received hundreds of thousands of dollars from government agencies for acting as an informant; there was testimony suggesting his compensation was affected by the quantity of drugs seized as a result of his work. Docket # 11.1 at 28-29, 45. Third, the few seconds that elapsed between the informant's claimed report of seeing the drugs and the agents commencing the arrest of Lopez-Armenta raised a question about whether there had been sufficient time for the informant to have transferred the drugs from petitioner's jeep to his car, as he claimed. Docket # 11.1 at 104-105.

The defense stressed this doubtful timing in its argument to the jury, and encouraged jurors to listen to the tape recording this span of time. Docket # 11.1 at 120. That the jury in fact requested that they be provided this tape so they could listen to it suggests that question was of some concern to the jury. Docket # 11.1 at 16, 122.

The informant's account of the movement of the drugs to his car also was inconsistent with that of Agent MacPherson. MacPherson testified that he had received texts from the informant alerting that he had seen a gun, and then that he had observed drugs, and after receiving those texts, observed the informant lean into the jeep, walk from the jeep to his car, and then return to the jeep. Docket # 11.1 at 38-39. The informant, however, stated that he first transported the drugs from petitioner's jeep to his car, returned to the jeep and only then sent the texts about the gun and observing the drugs. Docket # 11.1 at 104-105.

Additionally, neither of the two police reports of the incident reported any transfer of an object by the informant from the jeep to his car. Docket # 11.1 at 52-53, 108-109. DEA Agent Parker, who participated in the operation, acknowledged this was the type of significant event that belonged in the police report. Docket # 11.1 at 46-47, 53.

Finally, the informant's arrangement with the drug trafficker and with Lopez-Armenta was that the money for the drugs would be presented at the time of delivery.

Docket # 11.1 at 98-99, 103. Yet, the informant gave Lopez-Armenta no money, and indeed had no money to give him. Docket # 11.1 at 101, 105.

In short, crediting the evidence showing Lopez-Armenta was guilty of simple possession of a controlled substance did not logically compel the jury to find he had possessed a controlled substance to distribute.[6] Accordingly, the court's refusal to instruct on the lesser included offense of simple possession of a controlled substance violated petitioner's constitutional right to present a defense, which requires reversal of his

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6. In rejecting petitioner's claim failure to instruct on the lesser included offense to have been error that was not based on the Constitution, the Ninth Circuit panel cited undisputed evidence, petitioner's conversation with a government informant in which they had discussed the informant's wish to obtain fentanyl pills and arranged to meet, that he was arrested at that meeting in possession of a gun, ammunition, admitted possession of the 429.6 grams of fentanyl pills found in his jeep and $3,500 in cash. App. 3.

This contention presupposed that the only rational inference that could have been drawn from these facts is that petitioner intended to distribute the fentanyl. The court was mistaken. For example, that petitioner had planned to meet with the informant, and in fact did so could have reflected an intent to rob the informant of the money with which the informant was supposed to pay for the fentanyl. Alternatively, it could have reflected an intent to evaluate the informant's credibility as a potential buyer with the intention of arranging a subsequent meeting for the sale either involving petitioner or someone other than petitioner. He even could have been considering discontinuing his apparent involvement with the drug trafficker on whose behalf the prosecution maintained he was selling fentanyl to seek employment with the informant's organization. The considerable reason, as shown above, to doubt the other evidence advanced by the prosecution certainly provided ground for the jury to reasonably entertain the possibility that petitioner's intent may not have been to distribute fentanyl.

Moreover, as noted, independent of this evidence, there was compelling evidence on which the jury could have relied to find petitioner guilty of the lesser offense of simple possession fentanyl without finding he intended to distribute it. *See United States v. Medina-Suarez*, 30 F.4th 816, 822 (9th Cir. 2022).

convictions for possession of a controlled substance and possession of a firearm in commission of a drug trafficking crime. *See United States v. Escobar de Bright*, *supra*, 742 F.2d at 1201.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Dated: February 8, 2025

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

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APPENDIX A

App. 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 14 2024

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

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. FERNANDO LOPEZ-ARMENTA, Defendant - Appellant.	No. 23-618 D.C. No. 2:21-cr-00132-JCC-1 MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, Senior District Judge, Presiding

Argued and Submitted June 5, 2024
Portland, Oregon

Before: RAWLINSON, FORREST, and SUNG, Circuit Judges.

Fernando Lopez-Armenta appeals his convictions for possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841 (a)(1), (b)(1)(A), and for carrying a firearm during the commission of a drug trafficking crime in violation of 18 U.S.C. § 924 (c)(1)(A)(i). We have jurisdiction under 28 U.S.C § 1291, and we affirm.

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

1. The district court did not abuse its discretion by declining to instruct the jury on the lesser-included offense of simple possession. A defendant is entitled to a lesser-included offense instruction if, among other things, "the evidence would permit a jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater." *United States v. Medina-Suarez*, 30 F.4th 816, 819 (9th Cir. 2022) (quoting *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007)) (cleaned up).[1]

We review the district court's "factual inquiry" as to whether "the record contains evidence that would support a conviction of the lesser offense" for abuse of discretion. *Id.* at 820 (quoting *Arnt*, 474 F.3d at 1163) (cleaned up). Where "evidence used to prove an element common to both the greater and lesser offenses necessarily prove[s] the distinct element of the greater offense[,] . . . . a jury could not rationally find the defendant guilty of the lesser offense without also finding him guilty of the greater offense." *Id.* at 821–22. "[A] district court may not weigh

[1] Lopez-Armenta argued that he was entitled to a lesser-included offense instruction based on our holding that "a defendant is entitled to an instruction concerning his theory of the case if it is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense. . . ." *United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007) (internal quotation marks and citations omitted). That rule is not applicable here, because it concerns actual defenses or theories that defendants present. Rather, the specific rule for lesser-included offenses governs.

the evidence in determining whether to give a lesser included offense instruction." *United States v. Hernandez*, 476 F.3d 791, 800 (9th Cir. 2007).

The uncontested evidence at trial established that Lopez-Armenta contacted a confidential informant concerning the informant's need for fentanyl pills and arranged to meet with the informant. Police arrested Lopez-Armenta at this meeting. Lopez-Armenta had a gun, ammunition, about $3,500 in cash, and confessed to possessing approximately 429.6 grams of fentanyl pills recovered from his car. Considering all the uncontested evidence, the district court did not abuse its discretion in concluding that no rational juror could find that Lopez-Armenta possessed the 429.6 grams of fentanyl for personal use. *See id.* at 798 ("[W]here there is a large quantity of a drug and other evidence tending to establish distribution[,] . . . . once a jury determines that a defendant possessed the drugs, it could not rationally conclude that there was no intent to distribute." (citations and internal quotation marks omitted)).

2. The district court did not abuse its discretion by allowing the informant to testify in partial disguise wearing a COVID-style mask. *See United States v. de Jesus-Casteneda*, 705 F.3d 1117, 1119 (9th Cir. 2013) ("The appropriate standard of review for the district court's decision to allow the [confidential informant to testify in] disguise is abuse of discretion."), *amended on denial of reh'g en banc by* 712 F.3d 1283 (9th Cir. 2013). "A criminal defendant's

right to cross-examination includes the right to face physically those who testify against him and to ensure that the witness gives his statement before the jury so the jury may observe the witness's demeanor."*Id.* This requirement may be dispensed with when "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."*Maryland v. Craig*, 497 U.S.836, 850(1990).

Here, the mask disguise furthered the important public policy of ensuring the informant's safety.*See de Jesus-Casteneda*, 705 F.3d at 1120(holding that a confidential informant's disguise "was necessary to further an important state interest, namely a witness's safety . . . . given his continuing involvement in [cartel] drug investigations as an undercover agent."). Although only part of the informant's face was visible when wearing the mask, the remaining reliability factors were met. *See id.* at 1121 ("[T]he disguise in the form of a wig and mustache did not violate the Confrontation Clause" where "the reliability of the [informant's] testimony was otherwise assured . . . ."). The informant was physically present at trial, testified under oath, was subject to cross-examination while Lopez-Armenta could see him, and the jury was able to hear his voice, see his eyes, and observe his body language. *See id.* (listing these as "key elements of one's demeanor that shed light on credibility").

AFFIRMED.

APPENDIX B
App. 5

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. FERNANDO LOPEZ-ARMENTA, Defendant - Appellant.	No. 23-618 D.C. No. 2:21-cr-00132-JCC-1 Western District of Washington, Seattle ORDER

Before: RAWLINSON, FORREST, and SUNG, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc (Dkt. 51). 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. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is DENIED.