

No. _____

IN THE
Supreme Court of the United States

TANYA MORREO,
Petitioner

v.

UNITED STATES,
Respondent

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

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QUESTION PRESENTED FOR REVIEW

Whether this Court should vacate the court of appeals' decision and remand for re-sentencing when the same court of appeals publishes a decision after the mandate has issued but while this case is still on direct appeal that totally undercuts the reasoning in this case and presents reasonable probability that relief would be granted in this case on remand.

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IN THE SUPREME COURT OF THE UNITED STATES

TANYA MORREO,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner, Tanya Morreo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit, in an unpublished decision, affirmed Petitioner’s sentence in the face of claims that the district court had committed multiple, legal errors in applying U.S.S.G. § 3B1.2 to decide on an adjustment for mitigating role.¹ The Ninth Circuit held that the district court “properly compared [Petitioner] to her co-participants in the offense” and otherwise properly considered the guideline factors and additional factors in denying a minor role adjustment.²

¹ *See United States v. Morreo*, 690 F. App’x 992 (9th Cir. 2018). A copy of the memorandum decision is attached in Appendix A.

² *See id.*

Ms. Morreo sought rehearing en banc, arguing that the decision conflicted with the Ninth Circuit's own principles regarding review of guidelines-application error, as well as the circuit's minor-role caselaw published after the district court's denial of such an adjustment in this case. On January 4, 2018, the panel denied the petition for rehearing, and the full court declined to hear the matter en banc.³

JURISDICTION

On May 11, 2017, the Ninth Circuit affirmed Petitioner's sentence.⁴ On January 4, 2018, it denied his petition for rehearing.⁵ The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS

U.S.S.G. § 3B1.2 ⁶

STATEMENT OF THE CASE

Ms. Morreo pled guilty to one count of importing a detectible amount of methamphetamine into the United States in violation of 21 U.S.C. §§ 952 & 960.

It is undisputed that prior to her arrest, Ms. Morreo had been subjected to a lifetime of physical, emotional and sexual abuse, a history of trauma that led to her own drug addiction, poor choices, and participation in this offense.

³ A copy of the order denying rehearing is attached in Appendix B.

⁴ See Appendix A.

⁵ See Appendix B.

⁶ The text of these provisions are supplied in Appendix C attached hereto, pursuant to Sup. Ct. R. 14.1(f).

It was also undisputed below that the following facts represent the extent of Ms. Morreo's limited involvement in this offense as represented in her sworn affidavit that was unchallenged below, despite Ms. Morreo's offer to testify and be cross-examined.

Manny Lopez, who federal authorities have identified as having over 10 arrests since 2000 on drug-related charges, had invited Ms. Morreo down to Tijuana to gamble and have some fun. Manny asked to take Ms. Morreo's truck because he claimed the fan belt was broken on his car. At some point, Manny said he also "needed to talk with some people" in Tijuana, and at some other point before getting to Mexico, Manny told Ms. Morreo that he wanted to put some drugs in the spare tire of Ms. Morreo's car.

Ms. Morreo drove the truck down to Mexico, but Manny took over driving once they entered Mexico because Ms. Morreo didn't know her way around.⁷ Once in Mexico, Manny drove to a house and asked for a man named Primo who wasn't there. Manny told the occupant of the house to tell Primo that Manny would be at the same hotel that he stayed at the last time he was there.

Ms. Morreo and Manny gambled and spent the night in Mexico. The next morning Manny made a phone call, and a woman Ms. Morreo didn't know showed up and directed them back to Primo's house. A man everyone else called Chuey

⁷ Short of admitting guilt when subsequently questioned by federal authorities, Manny Lopez confirmed many of these details from Ms. Morreo's account of what transpired prior to her arrest.

picked up Ms. Morreo's truck and didn't return for about 40 minutes. When the truck was returned, Ms. Morreo wanted to go back to the United States at which point Manny told her that he was going to stay in Mexico to handle some "business." Ms. Morreo was upset and didn't even know how to drive back to the border from where they were.

Primo directed Ms. Morreo to follow a cab that would lead her to the border. Ms. Morreo was told that she would receive a phone call with further instructions once she crossed the border, and she was told that she would be paid \$2,500 for crossing. According to the government's investigation, crossing records show that Manny crossed the border on foot around the same time as Ms. Morreo.

Once Ms. Morreo arrived at the border, customs officers discovered methamphetamine concealed within the spare tire of her Jeep, and she was subsequently arrested and prosecuted for importation of a controlled substance. According to the government, Ms. Morreo had never crossed the border in her Jeep prior to the time of her arrest.

At sentencing, after being presented with this evidence, the district court denied minor role. It started by citing a pre-guidelines amendment case, *United States v. Hurtado*,⁸ by stating "it strikes me that the clearly the *Hurtado* factors are present here." Specifically, it found that Ms. Morreo "was the driver, occupant of the vehicle. There was a large quantity of drugs, and she was being paid." The

⁸ 760 F.3d 1065 (9th Cir. 2014).

district court further considered Ms. Morreo's sworn declaration, concluding despite her best explanation of the characters involved that "I really can't figure out who the average participant would be in that offense."

This last point was the subject of an extended colloquy between the district court and defense counsel. The court inquired about how to identify "the average participant," further admonishing counsel that "we can't consider hypothetical [participants]." The court asked counsel about "who owns the drugs." It then discussed with defense counsel the other known actors in this drug smuggling scheme, concluding with a question about whether defense counsel thought the driver or someone who loads the drugs into the car is more culpable:

So let me ask you this: in your view, who has the greater culpability in a drug smuggling offense, the person who knows that there are drugs in the car, who is being paid to bring the drugs across the border, who gets in the car, puts the key in the ignition, drives the car across the border, fails to tell the border agents that she has drugs in the car, or the people that are simply loading the vehicles with the drugs?

Defense counsel disputed that there was anyone in this particular case who "simply" loaded the drugs into the car without further culpability, which led to the court's next query

Let me ask you this: if those people loaded the drugs into the vehicle, and the vehicle stayed in Mexico, okay, would there have been a violation of 952, 960 [the controlled substance importation laws]?"

This led to a further discussion of the roles played by the known actors in this case that concluded with defense counsel acknowledging "the court's point that the crime cannot be committed without the person actually driving [the car]," to which the

court responded: “Right. Which the commentary says in and of itself is not necessarily indicative, but it certainly is a factor.”

Nevertheless, the district court denied a role adjustment because it believed from the information provided, it couldn’t “figure out who the average participant would be in that offense.” The court then imposed a 15-year prison sentence.

Ms. Morreo appealed her sentence to the Ninth Circuit, arguing that the district court had made multiple, legal errors in applying the role Guideline. First, it unduly relied on a drug quantity (and type) that Ms. Morreo knew nothing about, as well as the fact that she was a paid driver to deny minor role. Second, the court had failed to follow the binding commentary requiring a comparison with *all* participants responsible for relevant conduct under § 1B1.3. Instead, the district court focused solely on Ms. Morreo’s conduct and failed to make a reasoned comparison with the recruiter and others who orchestrated the entire run. Additionally, the district court failed to address Ms. Morreo’s limited knowledge about the organization and even of her own function, which the commentary to the role guidelines identifies as a central factor in analyzing a defendant’s role.

The Ninth Circuit affirmed the district court, disposing of Ms. Morreo’s appeal without the benefit of oral argument.⁹ The panel summarily stated that the district court “properly compared [Petitioner] to her co-participants in the offense”

⁹ See *Morreo*, 690 F. App’x at 992.

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and otherwise properly considered the guideline factors and additional factors in denying a minor role adjustment.¹⁰

Ms. Morreo sought rehearing, arguing that the panel failed to adhere to recent en banc precedent governing review of guidelines issues, in particular, the panel's failure to more closely scrutinize the district court's generalization of facts to preclude minor role in virtually every courier case. She also argued that the panel failed to accurately apply the Ninth Circuit's then most-recent precedent on minor role analysis, *United States v. Quintero-Leyva*, in claiming that the district court properly considered all factors in denying minor role.

On January 4, 2018, the Ninth Circuit declined to rehear the matter.¹¹

Yet barely two months later on March 9, and after the mandate had issued in this case, the Ninth Circuit published another minor-role decision in *United States v. Diaz*,¹² a case from the same district in which the same district judge engaged in the identical analysis, yet in which the court of appeals held that “[a]lthough the district court has considerable latitude in ruling on minor-role adjustments, on this record we must remand for re-sentencing because the decision to deny the adjustment rested on incorrect interpretations of the [mitigating role] guideline and [recent amendment].”¹³

¹⁰ *See id.*

¹¹ *See* Appendix B.

¹² 2018 U.S. App. LEXIS 5935 (9th Cir. 2018).

¹³ *Id.* at *17.

REASON FOR GRANTING THE PETITION

THE COURT SHOULD GRANT CERTIORARI, VACATE THE JUDGMENT AND REMAND FOR RESENTENCING BECAUSE RECENT DEVELOPMENTS IN THE NINTH CIRCUIT'S OWN CASELAW DEMONSTRATE A REASONABLE PROBABILITY OF A DIFFERENT RESULT HERE

Tanya Morreo, struggling with her own addiction and a lifetime of sexual, physical, and emotional abuse, crossed a single of drugs across the border in the most unsophisticated way (in a spare tire) at the behest of a man who organized the whole venture but bailed on doing it himself at the last minute. Yet, despite what, on its face, is a straight-forward case of the lowest-level drug courier, the district court claimed it couldn't figure out who the average participant was in this offense, even though Ms. Morreo provided a detailed accounting of those she knew to be involved. Instead, it fixated on the fact that there was a large quantity of drugs and Ms. Morreo was getting paid to cross them, while failing to credit her lack of knowledge as indicative of a mitigated role in this offense. It then sentenced her to a decade and a half in prison.

The district court's minor role analysis in Ms. Morreo's case was deficient in a near identical way that the Ninth Circuit deemed to warrant a remand for resentencing in *United States v. Diaz*, a case that was before the very same district judge, the Honorable Roger T. Benitez, for sentencing less than two months before Ms. Morreo's case. But because that decision was published shortly after the mandate issued in Ms. Morreo's case, she was unable to avail herself of *Diaz's* beneficial analysis in the court of appeals. This Court should provide that relief.

As part of its "discretionary certiorari jurisdiction," the Court has "broad power" to grant certiorari, vacate the judgment below, and remand the case (GVR) to the Court of Appeals. *See Lawrence on Behalf of Lawrence v. Charter*, 516 U.S. 163, 165 (1996). A GVR order is "potentially appropriate" where

intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Id. at 167. Whether a GVR is "ultimately appropriate" depends on the equities of the case: "If it appears that the intervening development, . . . is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168. And equities favor the defendant in criminal cases because "[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Stutson v. United States*, 516 U.S. 193, 197 (1996). A GVR is appropriate here because shortly after the Ninth Circuit issued the mandate in this case, it published an opinion that directly undermines the legal reasoning of the district court and Ninth Circuit here.

In *Diaz*, the same district judge who sentenced Ms. Morreo on May 2, 2016, sentenced the defendant in that case on March 7, 2016, for the importation of controlled substances into the United States. And in that case, the district judge denied an adjustment for minor role as well. But unlike here, in *Diaz*, a panel of the Ninth Circuit vacated the defendant's sentence and remanded for re-sentencing and reconsideration of the defendant's role in light of the guidance provided in that opinion.¹⁴

Beyond sharing the same district judge and being sentenced close in time, Ms. Morreo and Mr. Diaz and their cases shared many other similarities. Both of them were arrested at ports of entry driving their own vehicles. Both of them were bringing large quantities of dangerous drugs into the United States: Diaz was importing over 10 kilograms of cocaine and more than 3 and a half kilograms of heroin; Mr. Morreo was importing just under 10.4 kilograms of methamphetamine. But neither of these defendants knew what type or quantity of drugs they were bringing into the country. Both these defendants were getting paid for crossing the drugs: Mr. Diaz was originally supposed to get \$2000; Ms. Morreo was told she would receive \$2500. In both cases, these payments represented a miniscule fraction of the drugs total value. Regardless, neither defendant had a proprietary interest in the drugs.

¹⁴ 2018 U.S. App. LEXIS at *16-17.

Both defendants also shared similarities in the limited amount of knowledge they had about the smuggling operations' scope. Both defendants were with friends when they were recruited to cross drugs. Mr. Diaz was with a friend, Hector Rodriguez, when approached by a man he only knew as Peter; Ms. Morreo was with Manny Lopez, when approached by a man she only knew as Primo. Both provided their cars to others so that the drugs could be loaded, and neither was present when that happened and the vehicle was returned to them to cross.

Indeed, the only significant differences in the cases would point towards a bit more culpability for Mr. Diaz. As discussed above, Ms. Morreo was only in Mexico for a brief 24-hour period, asked to cross the drugs, and followed a cab back to the port of entry to cross before getting apprehended. Mr. Diaz, on the other hand, had crossed at least once before on a "dry run" to familiarize himself with the route and operation. And he had crossed at least one other time as a "scout," getting paid \$200, when his friend Hector, driving another car, got arrested crossing drugs.

These differences aside, as for how the district court resolved the two defendants' minor role requests, it denied a role adjustment using virtually identical reasoning. In Diaz's case, the government argued against role, pointing out that Diaz "was the registered owner of the vehicle he used, that he attempted to traffic a large and valuable quantity of drugs, and that he agreed to accept money in

exchange for the crossing.”¹⁵ The district court “adopted the government’s argument with little elaboration.”¹⁶ To the extent that the district court did elaborate, it was in response to Diaz’s argument that his role should be considered in comparison to a wider range of actors, including those unknown, in the larger conspiracy

The district court went on to conclude that even in comparison to the people who “create the drugs, who cut the drugs, who load the drugs, who then unload the drugs, who sell the drugs on the streets, who . . . generate the money and send the money back to Mexico,” Aguilar Diaz’s role of scouting and acting as a courier to smuggle a large amount of drugs across the border was not minor.¹⁷

As discussed *supra*, the district court’s reasoning in rejecting Ms. Morreo’s role arguments was virtually identical. It found that she was the driver of a vehicle with a large quantity of dangerous drugs and was getting paid to cross them. It ignored any significance with respect to her ignorance of the drug type or quantity. It failed to give any heed or credit to her limited knowledge about the scope of the operation or how that lack of knowledge alone might suggest a mitigated role. And when pressed to engage in a comparison of the other known and unknown participants in the larger smuggling conspiracy, the district court posed two questions to defense counsel suggesting that no one could be more culpable than the courier herself

¹⁵ 2018 U.S. App. LEXIS at *7.

¹⁶ *Id.* at *17.

¹⁷ *Id.* at *15-16.

So let me ask you this: in your view, who has the greater culpability in a drug smuggling offense, the person who knows that there are drugs in the car, who is being paid to bring the drugs across the border, who gets in the car, puts the key in the ignition, drives the car across the border, fails to tell the border agents that she has drugs in the car, or the people that are simply loading the vehicles with the drugs?

* * * *

Let me ask you this: if those people loaded the drugs into the vehicle, and the vehicle stayed in Mexico, okay, would there have been a violation of 952, 960 [the controlled substance importation laws]?"

In Ms. Morreo's case on appeal, the Ninth Circuit panel rejected her role arguments without argument in an unpublished memorandum. Yet, two months after the mandate issues in her case, the Ninth Circuit published an opinion in Mr. Diaz's case considering the district's court virtually identical reasoning in denying role and granted relief. In response to the district court's consideration of other actors and Diaz's relatively minor role, the court of appeals held that "[t]o the extent the district court's reasoning reflects reliance on courier conduct as dispositive of Aguilar Diaz's eligibility for a minor-role reduction, it was error."¹⁸ The court of appeals also cited Diaz's lack of knowledge about the type of quantity of drugs as a reason to grant relief; his limited knowledge of the larger scope of the criminal operation that recruited him; as well as his lack of proprietary interest in the drugs despite the promise of payment for his participation.¹⁹ It concluded by stating "[a] lthough the district court has considerable latitude in ruling on minor-

¹⁸ *Id.* at *16.

¹⁹ *Id.*

role adjustments, on this record we must remand for re-sentencing because the decision to deny the adjustment rested on incorrect interpretations of the [mitigating role] guideline and [recent amendment].”²⁰ This was no less the situation in Ms. Morreo’s case, yet she received no relief, and because her case proceeded slightly more quickly than Diaz’s in the court of appeals, she couldn’t avail herself of this caselaw development in the court of appeals.

This Court should exercise its discretionary jurisdiction and issue a GVR order in this case. Ms. Morreo is serving a 180-month sentence in a run-of-the-mill drug courier case where a minor role determination would have substantially lowered her presumptive guidelines. This is not a case where the intervening development, specifically the Ninth Circuit’s published decision in *Diaz*, is part of “an unfair or manipulative litigation strategy.”²¹ Had *Diaz* been published even a few months earlier, Ms. Morreo could have sought rehearing directly from the court of appeals on that basis or at least alerted the court to that authority while her petition for rehearing was pending. Nor is it a case where “delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court.”²² Rather it is a case where Ms. Morreo is serving a lengthy prison sentence that could only be reduced by further consideration of this

²⁰ *Id.* at *17.

²¹ *Lawrence*, 516 U.S. at 168.

²² *Id.*

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issue.²³ Discretion is appropriate in this case.

CONCLUSION

The Court should consider granting, vacating, and remanding the appeal for re-consideration under the Ninth Circuit's recent decision in *Diaz*.

Date: April 4, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Johnston III', written over a horizontal line.

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²³ See *Stutson*, 516 U.S. at 197 ("When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated.")