

No. A22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DELILAH GUADALUPE DIAZ,
Applicant,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

**APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

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**APPLICATION FOR EXTENSION OF TIME TO FILE A
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To: Justice Elena Kagan, Circuit Justice for the Ninth Circuit:

Under this Court's Rules 13.5 and 22, Applicant Delilah Guadalupe Diaz requests an extension of thirty (30) days to file a petition for a writ of certiorari in this case. Her petition will seek review of the judgment of the U.S. Court of Appeals for the Ninth Circuit in Case No. 21-50238, which affirmed her conviction of importing illegal drugs in violation of federal law. The Ninth Circuit's decision is available in the Westlaw database at 2023 WL 314309, and a copy is attached. *See* App. 1-7. In support of this application, Applicant provides the following information:

1. The Ninth Circuit issued its decision on January 19, 2023 and denied rehearing *en banc* on March 3, 2023. *See* App. 8. Without an extension, the petition for a writ of certiorari would be due on June 1, 2023. With the requested extension, the petition would be due on July 1, 2023. This Court's jurisdiction will be based on 28 U.S.C. § 1254(1).

2. This case is a serious candidate for review. It presents the question whether Federal Rule of Evidence 704(b) permits a governmental expert witness to testify in a prosecution for drug trafficking that drug trafficking organizations rarely, if ever, entrust large quantities of drugs to unknowing transporters. Rule 704(b) forbids expert witnesses from stating an opinion "about whether the defendant did or did not have a mental state or condition

that constitutes an element of the crime charged.” Fed. R. Evid. 704(b). But, applying its own precedent, the Ninth Circuit held here Rule 704(b) allows the type of testimony at issue here because “it does not provide an ‘explicit opinion’ on the defendant’s state of mind.” App. 7 (quoting *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013)).

At the same time, the Ninth Circuit acknowledged that the Fifth Circuit has adopted a contrary view. Under Fifth Circuit precedent, the testimony here would have been inadmissible under Rule 704(b) because “testimony that drug trafficking organizations rarely use unknowing couriers is the ‘functional equivalent’ of a prohibited opinion on mental state.” App. 6-7 (quoting *United States v. Guiterres-Farias*, 294 F.3d 657, 663 (5th Cir. 2002); accord *United States v. Herenandez-Acuna*, 202 Fed. Appx. 736, 739-40 (5th Cir. 2006); *United States v. Mendoza-Medina*, 346 F.3d 121, 128 (5th Cir. 2003)).

The Government brings nearly 20,000 drug trafficking cases each year. *See* United States Sentencing Comm’n, Quarterly Data Report, Fiscal Year 2022 at 2. About 90% of such cases that—like this one—arise from arrests at the border are prosecuted in the Ninth or Fifth Circuits, and defendants in such cases frequently claim that they did not know they were transporting drugs. Walter I. Congalves, Jr., *Busted at the Border: Duress and Blind Mule Defenses in Border-Crossing Cases*, 42 Feb. Champion 46 (2018). The question of what type of expert testimony is permissible in such prosecutions should not

depend on whether a person is tried in Texas, as opposed to neighboring Arizona or California.

3. This case presents an excellent opportunity for the Court to provide clarity to this recurring and important question presented. Applicant was arrested at the U.S.-Mexico border upon the discovery of a large quantity of methamphetamine hidden in the panels of her car. Applicant explained that she had gotten the car from her boyfriend and claimed that she did not know drugs were stashed inside it. The Government nevertheless charged her with importing methamphetamine in violation of 21 U.S.C. §§ 952 and 960—a crime that requires proof that the defendant *knew* she was transporting illegal drugs.

At trial, the Government sought to refute Applicant’s unknowing-carrier defense with expert testimony that drug trafficking organizations do not entrust “large quantities of drugs” to persons who are not “aware of those drugs.” 2 CA9 ER 50-51. Applicant expressly objected that such testimony would violate Rule 704(b). The district court, however, overruled that objection, and the Government introduced the testimony. Applicant was convicted and sentenced to seven years in prison. Applicant renewed her Rule 704(b) claim on appeal, but the Ninth Circuit rejected it and affirmed her conviction.

In short, as the Ninth Circuit conceded, this case squarely poses the question over which the Ninth and Fifth Circuit are split and contains no procedural glitches. App. 6-7.

4. This application for a thirty-day extension seeks to accommodate Applicant's legitimate needs. Applicant has recently affiliated undersigned counsel at the Stanford Supreme Court Litigation Clinic. The extension is needed for undersigned counsel and other members of the Clinic to fully familiarize themselves with the record, the decisions below, and the relevant case law. In light of the Clinic's many other current obligations to other pressing matters in coming weeks, the Clinic would not be able adequately to complete these tasks by the current due date.

For these reasons, Applicant requests that the due date for her petition for a writ of certiorari be extended to July 1, 2023.

Dated: April 28, 2023

Respectfully submitted,

By:  _____

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