

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FERNANDO LOPEZ-ARMENTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITIONER'S APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI**

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 Petitioner Fernando Lopez-Armenta respectfully requests that the time to file a Petition for Writ of Certiorari in this Court be extended for 60 days to and including February 15, 2025.

On September 18, 2024 the Ninth Circuit Court of Appeals denied Mr. Lopez-Armenta's petition for rehearing and for rehearing en banc following its August 14, 2024 decision which affirmed the district court's denial of his direct appeal of his criminal convictions brought under 21 U.S.C. § 841 (a)(1), (b)(1)(A) and 18 U.S.C. § 924 (c)(1) (A)(i). Thus, Mr. Lopez-Armenta's petition for certiorari currently is due on or before December 17, 2024. This application for extension of time is being filed more than ten days before that date. See Supreme Court Rules 30.2.

Copies of the opinion of the court of appeals affirming the judgment of the district court, and of the order denying the petition for rehearing and rehearing en banc are attached to this application as Appendix A, and Appendix B, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The petition will raise the following important question on which there is a split among circuit courts of appeals: In a criminal case in which the only defense raised is that the defendant is guilty of a lesser included offense, the does the 14th Amendment's

guarantee of due process require that the trial court grant a defense request for instruction on that lesser included offense? In this case, the Ninth Circuit Court of Appeals, citing the lack of controlling authority to the contrary, held that there is no such requirement. Appendix A at p. 2 n. 2. Conversely, in *United States v. Monger*, 185 F.3d 574, 576-578 (6th Cir. 1999) the Sixth Circuit Court of Appeals, relying on the due process concerns raised by this Court in *Keeble v. United States*, 412 U.S. 205, 212-213 (1973), held that in such cases, failure to instruct on the lesser included offense amounted to a structural error mandating reversal of the convictions.

I will be unable to research and draft the petition for writ of certiorari within the 90 days provided by Rule 13 for the following reasons.

I am a sole practitioner and I am sole counsel for Mr. Lopez-Armenta. Although I have been working diligently, due to prior obligations, since the September 18, 2024 denial of Mr. Lopez-Armenta's petition for rehearing, I have had to file a reply to an opposition to petition for writ of certiorari in *Rodrigo Alvarez-Quinonez v. United States*, U.S. Supreme Court No. 23-7605 on September 20, 2024, a complex reply to an informal response to petition for writ of habeas corpus in *In re Isaac Garcia Bracamontes*, Cal.Ct.App. No. H052051 on September 28, 2024, an appellant's opening brief in *Asha Singh v. State of Washington*, Wa.Ct App. No. 869329 on November 12, 2024, and time having been repeatedly extended, pursuant to notice under California Rule of Court 8.220 (a), I must file the appellant's opening brief in *Ibarra Professional Law Corporation v.*

Paulo Zhuo Heng Gu, Cal.Ct.App. Nos. A170743 & A170858 by December 21, 2024, file a complex reply brief in *United States v. Turrey*, Ninth Cir. No. 23-1956, time repeatedly having been extended, by January 2, 2025, present oral argument on January 10, 2025 in *State of Washington v. Darius Villa*, Wa.Ct.App. No. 856278 and file a petition for writ of certiorari in *People of California v. Isaac Garcia-Bracamontes*, Cal.Supreme Court No. S286311 by February 8, 2025.

Assistant U.S. Attorney, Erika Evans, who is respondent's counsel in this case, advised me by email that she has no objection to the requested extension of time.

WHEREFORE, Petitioner Fernando Lopez-Armenta requests that this Court grant him an extension of time up to and including February 15, 2025, in which to file his petition for writ of certiorari.

Dated: December 6, 2024

Respectfully submitted,

/s/ Randy Baker
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APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 14 2024

FOR THE NINTH CIRCUIT

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.

* 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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 18 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

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.