

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE GUADALUPE ZEPEDA-RAMIREZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

SHAUN KHOJAYAN
LAW OFFICES OF SHAUN KHOJAYAN
& ASSOCIATES, P.L.C.
Counsel of Record for Petitioner
515 S. Flower St., 19th Floor
Los Angeles, California 90013
Telephone: (310) 274-6111
shaun@khojayan.com

Appointed Under the Criminal Justice Act of 1964

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Presumption of Innocence and Fifth Amendment's Right to Due Process are violated when the district court denies a motion for acquittal when there is no evidence that the defendant actively participated in the conspiracy and intentionally aided the possession with intent to distribute the marijuana?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jose Guadalupe Zepeda-Ramirez, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 1, 2018.

OPINIONS BELOW

On March 13, 2018, the United States Court of Appeals for the Ninth Circuit issued an unpublished decision affirming petitioner's convictions and sentence in the Central District of California for two counts following a jury trial: conspiracy to distribute marijuana (21 U.S.C. § 846) and possession with intent to distribute marijuana (21 U.S.C. § 841(a)(1), (b)(1)(A)(vii)), and aiding and abetting (18 U.S.C. § 2(a)). App. A. On May 1, 2018, the United States Court of Appeals for the Ninth Circuit denied petitioner's Petition for Panel Rehearing and Rehearing En Banc. App. B.

JURISDICTION

On May 1, 2018, the Court of Appeals entered its decision affirming the convictions and sentence of the petitioner for violations of 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1), (b)(1)(A)(vii), 18 U.S.C. § 2(a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law

21 U.S.C. §§ 841, 846.

STATEMENT OF THE CASE

Petitioner Appellant Zepeda was convicted in the Central District of California of two counts following a jury trial: conspiracy to distribute marijuana (21 U.S.C. § 846) and possession with intent to distribute marijuana (21 U.S.C. § 841(a)(1), (b)(1)(A)(vii), and aiding and abetting, 18 U.S.C. § 2). The indictment was based on Miguel Rodriguez-Doranme (“Rodriguez”), and Mr. Zepeda’s presence on a boat transporting at least 1,000 kilograms of marijuana from Mexico to the United States on or about March 27, 2016. ER 184. Mr. Zepeda was sentenced to two years in prison followed by three years of supervised release.

Mr. Zepeda and his co-defendant Rodriguez-Doranme were found on a beach in Santa Barbara County after arriving by panga boat. The sheriffs located the panga boat on the beach loaded with bales of marijuana. ER 27.

The trial established the following material facts: Co-defendant Rodriguez was a fisherman and the captain of the panga boat. ER 63, 64. Mr. Rodriguez and Mr. Zepeda had met in Ensenada in 2015. ER 63. Before this trip, Mr. Rodriguez had asked Mr. Zepeda if he wanted a ride “north.” ER 63, 64. Mr. Zepeda was a welder. ER 63, 82. Mr. Zepeda agreed to get on the boat for a ride north to the United States. ER 82 (“If I’ll go north, I’ll make more money welding.”).

While Mr. Zepeda was on the panga boat, Mr. Zepeda drove the boat sometimes when the captain had to sleep, but Mr. Zepeda did not know where he was going. ER 76, 85. Mr. Zepeda had to wake up the captain to take over. ER 85.

There was no evidence that Mr. Zepeda knew what was on the boat when he boarded the boat. ER 83, 115. There was no evidence that Mr. Zepeda had loaded any of the marijuana onto the boat. ER 90. Mr. Zepeda denied that he had anything to do with the marijuana although he admitted that he thought there was marijuana on the boat. ER 84-85. There was no evidence that Mr. Zepeda knew where the boat was headed in the United States. ER 83.

No fingerprint evidence was presented that tied Mr. Zepeda to the marijuana or showing that he had dominion or control over the panga or the marijuana on it. ER 86-87. There was no evidence showing that Mr. Zepeda used the GPS device or the radio. ER 87, 88. There was no evidence that Mr. Zepeda even knew how to operate a GPS device or how to navigate a boat. ER 64, 83, 88. There was no evidence from any of the seized phones or walkie talkie radio that tied Mr. Zepeda to drug smuggling or any drug conspiracy.

Once Mr. Zepeda arrived with co-defendant Rodriguez near Hollister Ranch, Mr. Zepeda abandoned the panga and the marijuana and started walking away from it. ER 135; *see also* ER 78. There was no evidence that Mr. Zepeda had any connection or contact with the alleged caravan of cars that came near Hollister Ranch that morning. Security guards from Hollister Ranch testified that often cars come to the Hollister Ranch gate and turn around. ER 35. A resident of Hollister Ranch testified that it is a popular surf spot. ER 136-137.

There was no evidence that Mr. Zepeda engaged in suspicious or diversionary measures while on the panga or when law enforcement officials approached him.

The evidence was that Mr. Zepeda walked calmly when the authorities made contact with him. ER 151, 152.

On appeal, Mr. Zepeda argued that his convictions should be reversed because there was no evidence of his knowing and active participation to support either conviction. There was no evidence that Mr. Rodriguez had any pre-arranged plan to pay Mr. Zepeda any part of the fee that Mr. Rodriguez was going to receive for the marijuana transportation, further supporting the lack of active participation and intent to aid the possession and distribution of the marijuana by Mr. Zepeda. ER 78; Ex. 208-A at 3.

The Ninth Circuit Court of Appeals upheld Mr. Zepeda's convictions and sentence.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH AMENDMENT'S RIGHT TO DUE PROCESS AND THE PRESUMPTION OF INNOCENCE REQUIRE REVERSAL BECAUSE THERE IS NO EVIDENCE THAT THE DEFENDANT ACTIVELY PARTICIPATED IN THE CONSPIRACY AND INTENTIONALLY AIDED THE POSSESSION WITH INTENT TO DISTRIBUTE THE MARIJUANA

The Court of Appeals for the Ninth Circuit's affirmance of the district court's denial of the motion for acquittal require reversal because they violated Due Process under the Fifth Amendment of the United States Constitution and the Presumption of Innocence.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law . . .

Amendment V, U.S. Constitution. *See also Johnson v. United States*, 135 S. Ct.

2551, 2556 (2015).

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453 (1895). “In all cases of doubt, the most merciful construction of facts should be preferred....In criminal cases the milder construction shall always be preserved.” *Id.* (internal quotations and citations omitted).

The Court of Appeals for the Ninth Circuit found that before Mr. Zepeda entered the boat “Zepeda-Ramirez knew the cargo was marijuana and he helped steer the boat to the United States.” App. A at 2. However, Due Process and the Presumption of Innocence require that the Ninth Circuit and the district court not have overlooked that Mr. Zepeda found out that the boat contained marijuana only after the boat had already driven to sea, not before. ER 83, 90, 115. Mr. Zepeda aimlessly drove the boat only sometimes, which did not aid the drug smuggling venture. ER 85.

A person is guilty of knowingly conspiring or aiding and abetting if they joined the agreement knowing of its purpose and intending to help accomplish that purpose. 9th Cir. Model Crim. Jury Instr. § 9.19. To prove that defendant is guilty of conspiring to distribute illegal drugs under 21 U.S.C. § 846, Government must prove beyond reasonable doubt: (1) existence of agreement between two or more persons to violate narcotics laws, (2) knowledge of conspiracy and intent to join it, and (3) voluntary participation in conspiracy; Government need not prove overt act to show

participation in conspiracy, but mere presence or association alone are not sufficient to prove participation in conspiracy. *United States v. Turner*, 319 F3d 716 (5th Cir. 2003), *cert denied*, 538 US 1017 (2003).

Here, the Court of Appeals for the Ninth Circuit erroneously affirmed the district court's denial of petitioner's motion for acquittal without evidence in the record that Mr. Zepeda knew of the marijuana before boarding the boat. Knowledge that there were drugs present in the boat should not have been sufficient to prove petitioner's involvement in the conspiracy to possess with intent to distribute narcotics. See *United States v. Sanchez-Mata*, 925 F.2d 1166, 1168 (9th Cir. 1991).

In *Sanchez-Mata*,

Sanchez-Mata was merely a passenger in the Audi. At the time of arrest he had only \$24 on him, no drug transaction was underway, and he did ***not attempt to evade*** capture or arrest. Sanchez-Mata's ***fingerprints were not found*** on the drug bags. ***No long term or familiar*** relationship was established between him and the other defendants. The government's strongest evidence is that Sanchez-Mata previously pleaded guilty on a drug-related offense. This conviction was admitted into evidence to prove knowledge: Sanchez-Mata knew what marijuana smelled like and must have recognized the strong odor present. ***However, knowledge that drugs are present is not enough to prove involvement in a drug conspiracy... Sanchez-Mata's behavior was 'consistent with that of an innocent person having no stake or interest in drug transactions.***

Id.

Just like in *Sanchez-Mata*, there was no evidence that Mr. Zepeda had any interest in the drugs. Mr. Zepeda had no significant money on him nor was there a pre-arranged plan that he was going to be paid for his travel on the boat. There was no fingerprint evidence tying him to the marijuana on the boat. The evidence was

that Mr. Zepeda was a welder that agreed to travel north to the United States to be able to find work.

“Although an agreement may be inferred from the defendant’s acts or from other circumstantial evidence, ‘simple knowledge, approval of, or acquiescence in the object or purpose of a conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient.’” *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980).

The Ninth Circuit Court of Appeals’ decisions conflicts with the Presumption of Innocence as defined by this Court and Substantive Due Process. Being in the presence of large amounts of drugs is plainly not enough for a conspiracy or possession with intent to distribute conviction. Even where the defendant allegedly knew “what marijuana smelled like and must have recognized the strong odor present” is not enough for a conviction. *Sanchez-Mata*, 925 F.2d at 1168. “[K]nowledge that drugs are present is not enough to prove involvement in a drug conspiracy.” *Id.* Further, conduct that does not aid the purpose of the conspiracy, such as driving the boat aimlessly, is not enough either because it does not help accomplish the goal of the conspiracy or aid in its success.

That the boat Mr. Zepeda arrived in “contained equipment typically used by smugglers to coordinate with partners to pick up the cargo after making landfall” is also insufficient when there was no evidence that Mr. Zepeda ever touched or used any of the electronic equipment on board. To imply knowledge and active participation on Mr. Zepeda merely based on his presence on a boat that contained

such equipment, when there was no evidence that he used or even knew how to use that equipment violates the Presumption of Innocence and Substantive Due Process under the Fifth Amendment.

Consistent with the Presumption of Innocence, it was error for the Court of Appeals and the district court to assume that the defendant must have been involved in the conspiracy or else he “would not have been trusted to be a passenger” in the boat. Contrary to this, none of those devices had Mr. Zepeda’s fingerprints on them and, regardless, there was no evidence that Mr. Zepeda had used those items. ER 87, 88. There was no evidence that Mr. Zepeda even knew how to operate a GPS device or how to navigate a boat. ER 64, 83, 88.

“Constructive possession requires the government to show ‘a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised dominion and control over the [marijuana].” *United States v. Nungaray*, 697 F.3d 1114, 1117 (9th Cir. 2012). “Mere proximity to contraband and mere association with a person controlling the contraband are each insufficient to show constructive possession.” *Id.*

“It is well established that a passenger may not be convicted unless there is evidence connecting him with the contraband, other than his presence in the vehicle.” *Sanchez-Mata*, 925 F.2d at 1169. In *Sanchez-Mata*, the defendant’s convictions for conspiracy to possess with intent to distribute narcotics and possession with intent to distribute narcotics were reversed because of insufficient evidence.

The government had “failed to establish...dominion and control.” *Id.* The defendant in *Sanchez-Mata* “did not have a key to the trunk or car, was not driving the car, did not own the car.” *Id.* Similar to *Sanchez-Mata*, the evidence here showed that Mr. Zepeda was not the owner of the panga or the marijuana, was not the captain of the boat, and there was no evidence that he had the key to the boat.

Furthermore, there was a lack of fingerprint evidence against Mr. Zepeda which, based on the Presumption of Innocence and Due Process, should not have been overlooked.

There was no evidence, such as fingerprints, connecting him to the containers found in the trailer. There was no evidence that he maintained control over his quarters; indeed, there was contrary evidence that the residents of the house frequently entered the trailer. There is no evidence that he had any interest in the house, garage or trailer; no utility bills, no written statements.

United States v. Estrada-Macias, 218 F.3d 1064, 1967 (9th Cir. 2000) (emphasis added).

Further, also in *Sanchez-Mata*, the defendant “was never seen touching the marijuana and his fingerprints were not on the bags.” 925 F.2d at 1167.

Here, there was no evidence of any fingerprint evidence tying the defendant to the electronic equipment and marijuana. *Cf. United States v. Valles-Valencia*, 811 F.2d 1232, 1240 (9th Cir.), modified, 823 F.2d 381 (9th Cir. 1987) (one of the factors that indicated defendant’s knowledge of and participation in the distribution scheme of drugs was that “his fingerprints were found on items discovered at two other marijuana warehouses.”).

Therefore, the Ninth Circuit Court of Appeals' findings that Mr. Zepeda's presence on a boat that had electronic equipment that helped coordinate pick up of the drugs upon reaching landfall -- *without any evidence in the record* that Mr. Zepeda used or even touched any of that equipment misapprehends the facts and case law that states that mere presence is insufficient for conviction on these counts.

Mr. Zepeda's conviction and the Court of Appeals for the Ninth Circuit's decisions were in violation of Due Process and the Presumption of Innocence because the evidence was insufficient to convict Mr. Zepeda of both conspiracy and possession with intent to distribute the marijuana. The Petition should be granted and the decision of the Court of Appeals for the Ninth Circuit should be reversed.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



Date: July 30, 2018

SHAUN KHOJAYAN
LAW OFFICES OF
SHAUN KHOJAYAN & ASSOCIATES,
P.L.C.
515 S. Flower St., 19th Floor
Los Angeles, CA 90071
Telephone: (310) 274-6111
shaun@khojayan.com
Counsel for Petitioner
Jose Guadalupe Zepeda-Ramirez