

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2018

JOHN WILLIAM LIEBA II,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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SUBMITTED: October 9, 2018

QUESTION PRESENTED

WHETHER, SUFFICIENT EVIDENCE EXISTED TO CONVICT MR. LIEBA?

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**PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, John William Lieba II, respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

In a Memorandum Opinion, the Ninth Circuit affirmed the judgement of the trial court.

See, Appendix A.

JURISDICTION

The Court of Appeals issued its Memorandum Opinion on July 11, 2018. See, United States v. John William Lieba II, 730 F. App'x. 480 (9th Cir. 2018). Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Nature of the Case

1. Introduction

John William Lieba II challenges his convictions of kidnapping; aggravated sexual abuse; and assault resulting in serious bodily injury. Mr. Lieba has a constitutional right to be convicted beyond a reasonable doubt, which requires more than mere speculation. Given the insufficient evidence presented in Mr. Lieba's case, especially as it concerns the aggravated sexual abuse, his convictions should be reversed. He is seeking review of the Ninth Circuit's decision that he was not denied due process and was fairly convicted.

2. Proceedings in the District Court

On June 21, 2016, the United States indicted Mr. Lieba on Count I, kidnapping of an individual under 18 in violation of 18 U.S.C. §§ 1153(a), 1201(a), and 3559(f)(2); Count II, aggravated sexual abuse in violation of 18 U.S.C. §§ 1153(a) and 2241(c); and Count III, assault resulting in serious bodily injury on an individual under 18 in violation of 18 U.S.C. §§ 1153(a), 113(a)(6), and 3559(f)(3). He appeared and was arraigned on June 23, 2016. Mr. Lieba pled not guilty. Mr. Lieba proceeded to a jury trial. The jury found him guilty of all three counts. Mr. Lieba was sentenced to 500 months imprisonment on each count to run concurrently, followed by a five (5) year term of supervised release.

3. Decision by the Court of Appeals

On appeal, a panel of the Ninth Circuit Court of Appeals affirmed the district court's judgement.

4. Bail Status of Petitioner

Mr. Lieba is serving his sentence at USP Tucson. His projected release date is June 14, 2052. His complete address is reproduced in the Certificate of Service.

B. Statement of the Facts

The government tried to paint a grim picture of Mr. Lieba taking part in grabbing M.L. from a neighborhood park, sexually assaulting her, and leaving her to be found hours later.

The jury heard evidence from a variety of witnesses. One child witness testified that Mr. Lieba had taken M.L. Another child witness described Mr. Lieba's clothing on the day of the incident but she did not see Mr. Lieba take M.L. M.L. was found in a truck that was parked at a

grain elevator company. Mr. Lieba denied knowing where M.L. was but then provided a general location where she may be found.

The officer who found her described her rescue. He also described how he found it unusual that M.L. seemed to be laying in a “makeshift” bed, whereby the seats of the truck had been removed. He never found those seats, nor were fingerprints or forensic evidence recovered from the truck.

A doctor who specializes in child sexual assault testified as to the various injuries M.L. sustained. She provided specific testimony as to the injuries while still indicating that she could not say the injuries sustained to M.L.’s anus were due to blunt force trauma. In that regard, the DNA examiner testified that while a mixture of M.L.’s DNA and Mr. Lieba’s DNA was found on specific swabs, no semen was found in M.L.’s vaginal swab nor was Mr. Lieba’s DNA found in M.L.’s oral swab. The DNA examiner also indicated that DNA may be passed from hand-to-hand and then transferred to another part of the body thereafter. The DNA examiner could not say that sexual contact between Mr. Lieba and M.L. had, in fact, occurred and the clinician who tested Mr. Lieba’s blood for herpes simplex viruses I and II did not know, in fact, that the blood she tested was his. She merely tested what was sent to her.

A special agent with the Federal Bureau of Investigations testified about her office’s investigative efforts. She surmised that Mr. Lieba must have placed M.L. in the white truck where she was found, but she also testified that Mr. Lieba’s fingerprints were not found on M.L.’s boots that were nearby. His fingerprints were not found in the truck where M.L. was found, nor were his fingerprints found in the semi-truck from where a laptop that Mr. Lieba later had and a comforter were stolen.

Mr. Lieba moved for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, especially as it concerned the aggravated sexual abuse count. In particular, Mr. Lieba argued that while evidence of trauma had been shown, the government had not proven evidence of a sexual act.

The district court denied the motion. Ultimately the jury convicted Mr. Lieba on all three counts.

REASON TO GRANT PETITION

The Due Process Clause to the United States Constitution prohibits a person from being convicted based on evidence that is less than proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). In *Winship*, proof beyond a reasonable doubt became the jury's standard for the evidence. The Supreme Court thereafter answered the question whether the same standard applied to a court's review of the evidence in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The defendant in *Jackson* argued the state had insufficient evidence of premeditation to support his conviction. *Jackson*, 443 U.S. at 312. The Supreme Court held a reviewing court must “determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” *Id.* at 318. Doing so ensured the reasonable doubt standard articulated in *Winship*. *Id.* Hence, a district court should ask “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 319.

The *Winship* Court indicated the government's proof beyond a reasonable doubt standard is “a subjective state of certitude.” *In re Winship*, 397 U.S. at 364 (quotation omitted). The standard represents society's belief that no person should be convicted of a crime unless the fact-

finder is nearly certain of that person's guilt. *Id.* Indeed, the prosecution has the burden of proving the defendant guilty beyond a reasonable doubt.

In reviewing the sufficiency of the evidence, Mr. Lieba understands that a reviewing Court's review is through a lens most favorable to the government. *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). While this is a strict standard that gives a great deal of deference to the jury's fact-finding, this Court's review still requires an interpretation of the evidence that would allow a reasonable minded jury to find the defendant guilty *beyond a reasonable doubt*. *Id.* Therefore, it is not enough to find a reasonable jury could believe a particular fact to be true based on the evidence presented. Instead, the evidence must be sufficient to allow the jury to find all elements of the offense beyond a reasonable doubt.

A conviction cannot be sustained where it is based on "mere suspicion or the possibility of guilt." See *United States v. Kenyon*, 481 F.3d 1054, 1068 (8th Cir. 2007) (internal quotations and citation omitted). The Eighth Circuit in *Kenyon* held the evidence was insufficient to support the defendant's conviction on two counts of aggravated sexual abuse where the victim testified the sexual contact occurred "twice maybe;" where upon further questioning the victim did not know whether the sexual contact occurred once or twice; and where there was no independent evidence of the sexual encounters. *Kenyon*, 481 F.3d at 1068.

"Speculation and conjecture cannot take the place of reasonable inferences and evidence—whether direct or circumstantial." *Juan H. v. Allen*, 408 F.3d 1262, 1279 (9th Cir. 2005) (after resolving all conflicting factual inferences in favor of the prosecution, insufficient evidence existed to support the conclusion that the defendant knew of the plan to commit first-degree murder or that defendant took action to facilitate the murders).

The doctor could not say whether M.L.'s anal injury was blunt force trauma, and as it concerned the vaginal injury, the doctor could not say if such trauma was of a sexual nature. As instructed, a sexual act means contact between the penis and the vulva or the penis and the anus. It does not mean contact between the penis and a hand. *See* 18 U.S.C. § 2241(c); The DNA examiner said there was no DNA found in M.L.'s vagina from Mr. Lieba and she could not say if sexual intercourse occurred. And, neither Mr. Lieba's skin, hair, nor mucous was tested so the possibility still existed that any of his DNA found could be from transferred DNA and not necessarily from a sexual act.

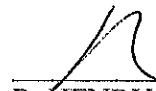
Consequently, the evidence did not prove beyond a reasonable doubt that Mr. Lieba committed an aggravated sexual act against M.L. Rather, taken together, the evidence shows that Mr. Lieba's conviction was based on the possibility that he committed the act of aggravated sexual abuse. His conviction, therefore, cannot stand.

Mr. Lieba's remaining convictions are similarly speculative. No forensic evidence existed linking Mr. Lieba to the truck where M.L. was found. Nobody compared the shoes Mr. Lieba was wearing with the footprints found at the scene; nobody showed that a ransom was requested; nor did the statistical reports discussed actually indicate the incidents of herpes on the reservation. Consequently, just as scant as the evidence was in *Kenyon*, so too was the evidence insufficient to find beyond a reasonable doubt that Mr. Lieba committed the act of kidnaping or assault resulting in serious bodily injury.

CONCLUSION

For the above stated reasons, the Court should grant Mr. Lieba's Petition for Writ of Certiorari.

DATED this 9th day of October, 2018.


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