

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAVIER PORTILLO,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page.

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit's analysis of the facts was inadequate and whether, when the entirety of facts presented at trial was considered, there was sufficient evidence that petitioner Javier Portillo had knowledge of narcotics hidden in his vehicle at the time he crossed the border from Mexico into the United States.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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Petitioner Javier Portillo 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 September 18, 2018.

OPINION BELOW

On September 18, 2018, a panel of the Ninth Circuit issued an Unpublished Memorandum affirming the judgment of the district court.^{1,2}

¹A copy of the Judgment is attached as Appendix A.

²A copy of the Unpublished Memorandum is attached as Appendix B.

JURISDICTION

The panel of the Court of Appeals issued its decision rendering final judgment in this case on September 18, 2018 when it issued its unpublished Memorandum. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In *Jackson v. Virginia*, 443 U.S. 307, 313-320 (1979), this Court held that the due process clause of the Fourteenth Amendment is violated by conviction of a crime without sufficient evidence that each elements has been proven beyond a reasonable doubt.

STATEMENT OF THE CASE

Petitioner Javier Portillo waived indictment and was charged by a one-count Information filed on April 21, 2016 with knowingly and intentionally importing a mixture and substance containing a detectable amount of cocaine into the United States, in violation of Title 21 U.S.C. 952 and 960. (Clerk's Record, page 11, hereinafter referenced CR 11; Excerpt of Clerk's Record filed with the Ninth Circuit, page 2, hereinafter ECR 11) He pled not guilty.

Trial commenced on November 29, 2016 and on December 1, 2016, the jury returned a guilty verdict on Count 1 of the Information. (CR 45; ECR 4)

The district court sentenced petitioner Portillo on April 17, 2017 to 46 months in custody and a supervised release period of three years. A \$100 assessment fine was waived. (CR 56 (written judgment); ECR 5-8) A copy of the Judgment is contained in Appendix A to this Petition.

The notice of appeal was filed the following day, April 18, 2017. (CR 58; ECR 9-11) On September 18, 2018, the Ninth Circuit affirmed the judgment. A copy of the Unpublished Memorandum is contained in Appendix B to this Petition.

STATEMENT OF FACTS

Government's Case-in-Chief

At approximately 10:00 a.m. on the morning of March 26, 2016, Javier Portillo crossed into the United States, driving his Nissan Frontier, using the Sentri lane 5³ at the San Ysidro Port of Entry. (Reporter's Transcript, November 30, 2016, page 25, hereinafter referenced 11/30/16 RT 26)⁴ Mr.

³

People who have Sentri authorization have been pre-screened and pass through a vetting process by Department of Homeland Security prior to getting authorization to use Sentri lanes. It is the intention of the Sentri program to let people go through the border into the U.S. quickly (11/30/16 RT 61)

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Although Officer Gonzales testified at trial that Mr. Portillo appeared nervous and his hands were shaking, his report made no mention of any alleged nervousness. (RT 32-33) At the time, he suspected Mr. Portillo was nervous because he was lost and confused. (RT 32) Nervousness would at least have been something important to include in his report. (RT 33)

Portillo provided his New Mexico driver's licensee, which was not sufficient to gain access to the Sentri lanes, and the database revealed he was not a Sentri participant. (11/30/16 RT 27, 35) When asked, Mr. Portillo said he was a United States citizen and had traveled to Mexico to visit his boyfriend. (11/30/16 RT 28) Customs and Border Protection (hereinafter CBP) Officer Daniel Gonzalez referred Mr. Portillo to the secondary lot which is automatically done for a more in-depth screening when a person unauthorized to use the Sentri lanes, attempts to enter the U.S. through a Sentri lane. (11/30/16 RT 29, 36, 64)

CBP Officer Jorge Cruz operated the Z-Portal machine at Secondary on March 26, 2016 and noticed an anomaly when Mr. Portillo drove his vehicle through the machine. (11/30/16 RT 48, 54-55) Mr. Portillo was escorted to a secure area while Cruz informed other officers and requested canine assistance. (11/30/16 RT 55, 59-60)

CBP Canine Officer Linda Yorba was conducting normal operations at the border on March 26, 2016 with her dog Nico when she got a radio call to screen a truck because the x-ray operator had observed anomalies. (11/30/16 RT 71-72) Nico alerted to the passenger side cab area; his alert consisted of increased sniffing, a change in behavior and posture, tail wagging, and finally sitting in the rear cab area of the truck. (11/30/16 RT 73)

CBP Officer Thomas Ferguson processed the Nissan Frontier for possible narcotics on March 26, 2016. (11/30/16 RT 82-83) He pried open a plastic piece covering the seat belts in the rear passenger compartment and saw vacuum-sealed packages. He was eventually able to open the compartment with a hydraulic spreader tool and removed a total of 22 packages (11/30/16 RT 82-88) The substance inside the packages tested positive for cocaine using a field narcotics identification kit. (11/30/16, RT 88-89) At this point in time, Mr. Portillo was taken to the administrative office, photographed, and placed in a detention cell and informed he was under arrest for importation of narcotics into the United States. Mr. Portillo was quiet; he did not move or react, did not show shock or dismay. (11/30/16 RT 91, 106) Officer Ferguson has no way of knowing how old the drugs were. (11/30/16 RT 112)

The parties stipulated that the substances found inside the 22 packages seized from the Nissan Frontier driven by the defendant Javier Portillo, from Mexico into the United States on March 26, 2016, through the San Ysidro, California Port of Entry were inventoried and sent to the Drug Enforcement Administration, DEA Laboratory for analysis. The contents of these packages were properly analyzed by a forensic chemist and were found to contain a mixture and substance containing a detectable amount of cocaine, a Schedule

II controlled substance. Specifically the packages contained a net weight of approximately 21.91 kilograms, or 48.2 pounds, of cocaine. (Stipulation marked as Exhibit 42) (11/30/16 RT 113-114)

Mike Magers, a master auto technician, testified as an expert for the government. (11/30/16, RT 119) He inspected the Nissan Frontier and was asked to provide, if he could, an opinion as to the length of time it would take to built the compartment in which the narcotics were found. (11/30/16 RT 120-121) It was his opinion that it would take four hours to build the compartments with electromagnetic switches wired to the fuse box; that the person who did this would have had to prepare in advance and that the person had done not only one, but possibly more of these compartments before. (11/30/16 RT 138-139) He tried to find a switch; in fact, he spent 30% of his entire inspection just looking for a switch because he felt it was a smoking gun. He never found it. (11/30/16 RT 144-145)

According to Magers, the compartment would not have affected the functioning of the driver's systems. (11/30/16 RT 157, 162) If 50 pounds of something is distributed throughout the left and right side back seat of the cab, it is not going to impact a person's ability to drive the car. (11/30/16 RT 167)

Homeland Security Investigations Division (hereinafter HSI) Special Agent Cesar Valdivia testified to outgoing calls made from Mr. Portillo's cell phone which was seized at the time of his arrest. (12/1/16 RT 10-11) The phone was sent to a HSI forensic specialist. A Facebook message sent at 9:00 am on March 26, 2016 from Mr. Portillo's phone and stated, "I am so lost, baby." (12/1/16 RT 20) This message had no significance to Special Agent Valdivia in terms of the world of drug importation; it is not code for "I don't know what to do with all this cocaine" or something like that. (12/1/16 RT 34) In all of the text messages, Facebook messages, incoming and outgoing calls, contact numbers, Special Agent Valdivia found nothing indicating where those drugs were going or where they came from or anything that would have tied Mr. Portillo to those drugs. (12/1/16 RT 36)

Special Agent Valdivia subsequently met with Mr. Portillo and was provided an address for "Jesse" (Mr. Portillo's boyfriend) in Tijuana, however he was unable to contact him. (12/1/16 RT 46-47)

According to HSI Special Agent James Reavis, the wholesale value of a pound of cocaine in San Diego ranged from \$12,000-28,000. The wholesale value of 48.02 pounds was \$578,400 to \$1,349,600. (12/1/16, RT 53-54)

There are certain factors present when a so-called blind mule is involved⁵; one of those is that they frequently cross the border into the United States, at regular times; it is important where the drugs are actually in the vehicle as to whether the person is a blind mule. In Valdivia's experience with blind mules, the drugs have always been available from the outside of the vehicle. He has never heard of a blind mule where the drugs were hidden in the inside of the vehicle. He has never heard of a blind mule who didn't frequently cross into the United States. They have a consistent routine when going into the US so the trafficking organization can follow them. He has never heard of a blind mule who had drugs in an electronically operated compartment within their vehicle. (12/1/16 RT 63-64)

Special Agent Valdivia has never heard of any trafficking organization hiding a load inside a vehicle and having a blind mule drive the vehicle. The typical load is very small, like a kilogram; he has never heard of something like 50 pounds being driven by a blind mule. (12/1/16 RT 70)

Defense Case

HSI Special Agent Francisco Bernal assisted Special Agent Pederson in

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The district court agreed that counsel for Mr. Portillo had "opened the door" to testimony concerning drug trafficking organizations by her questions of Special Agent Valdivia about "blind mules." Counsel for Mr. Portillo agreed. (12/1/16 RT 61)

the interview of Javier Portillo. (12/1/16 RT 76-77) Mr. Portillo was very calm during the interview; he had \$65 on his person. (12/1/16 RT 78, 80)

Javier Portillo's mother, Mary Inez Portillo, testified that she has a good relationship with her son; that he is kind, helpful, loving, and caring. (12/1/16 RT 163) They talk about everything. Although she loves her son and does not want anything bad to happen to him, she would not lie to help him and was not lying during her testimony. (12/1/16 RT 168-169)

Testimony of Javier Portillo

In March of 2016, Mr. Portillo held three jobs and had completed two years of college. (12/1/16 RT 83) He lived in Albuquerque with his parents and was in a long-distance relationship with Jesse Heredia Mancera. (12/1/16 RT 84) Mr. Portillo drove from Albuquerque to Tijuana in August 2015 to visit with Jesse who had previously been deported from the U.S.. (12/1/17 88-95, 134, 153-154) At that time, Jesse's sister Mariana lived in the apartment. Mr. Portillo met Jesse's friend Cariana and her boyfriend Luis who was subsequently arrested for trafficking meth into the U.S.. (12/1/16 RT 133-134) He did not tell his parents about Jesse or that he was going to Tijuana and not California; he kept both things a secret from his parents. (12/1/16 RT 135-136)

Between August 2015 and March 2016, he and Jesse continued to have constant communication and in March 2016, he again drove from Albuquerque

to Tijuana, this time for a two week visit. (12/1/16 RT 97) By this time, Jesse had moved to a different apartment; one that Mr. Portillo paid for and that they planned to live in when Mr. Portillo moved to Tijuana that June. (12/1/16, RT 97) During the visit, he met some of Jesse's friends and most of the time, Mr. Portillo drove his truck. By this time, Luis was in prison. (12/1/16 RT 139) Jesse never had the truck without Mr. Portillo also being in the vehicle. (12/1/17 RT 105) Jesse's sister, Mariana, no longer lived with her brother, but did visit during the visit in March 2016. (12/1/18 RT 107)

On Saturday, March 26, 2016, as he got into his truck for the drive back to Albuquerque, Mr. Portillo noticed he didn't have his passport. He and Jesse looked everywhere for it, but couldn't find it. Mr. Portillo was worried that he would not be able to cross into the U.S. without a passport, but Jesse told him all he needed was identification. (12/1/18 RT 111-112)

Mr. Portillo got lost as he headed towards the U.S. border; he saw the word "SENTRI", but had no idea what it was. (12/1/18 RT 118) He kept trying to call Jesse, to find out what SENTRI meant, but there was no answer. (12/1/18 RT 119-121)

Javier Portillo did not know there were drugs in his truck. (12/1/16 RT 122, 132) No one paid him to do anything at all and no one asked him if they

could put drugs in his car and no one told him they were going to put something in his car. (12/1/16 RT 128-129)

As of the time of trial, he was no longer in a relationship with Jesse. Although he did not suspect anything at first, Mr. Portillo grew to be suspicious and when he stopped sending money to Jesse, the relationship ended. (12/1/16 RT 130-131)

When he was searched subsequent to his arrest, officers found a fake federal immigration ID card that he used when he wasn't yet 21 years old, to be able to get into bars. (12/1/16 RT 141) In addition, during his second trip to Tijuana, he had his cousin call his employer and explain he would not be returning to work on time because of trouble with his vehicle. That was not true. (12/1/16 RT 143-145)

REASON TO GRANT THE WRIT

The Memorandum decision of the Ninth Circuit failed to consider all of the facts in this case – facts which, if considered, would have formed reasonable doubt as to whether Mr. Portillo knew that there were narcotics hidden in his vehicle at the time he crossed the border from Mexico into the United States. Included in those facts was evidence that others, including at least one person who had a history of drug smuggling, had possession of the vehicle while Mr. Portillo was in Mexico.

ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO CONCLUDE THAT JAVIER PORTILLO KNEW OF THE PRESENCE OF NARCOTICS WITHIN HIS TRUCK WHEN HE CROSSED INTO THE UNITED STATES AT THE SAN YSIDRO PORT OF ENTRY

A. The Claim is Preserved

A the close of the government's case, counsel for Mr. Portillo moved for a judgment of acquittal. The motion was denied. (12/1/16 RT 71-72; ECR 2-3)

B. Standard of Review

The standard of review for determining the sufficiency of the evidence "is 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." *Jackson v. Virginia, supra*, 443 U.S. at 319; *United States v. Inzunza*, 638 F.3d 1006, 1013 (9th Cir. 2009) What the *Jackson* Court called "the critical inquiry" is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia, supra*, 443 U.S. at 318; see also *Manuel v. City of Joliet*, 137 S.Ct. 911, n. 8 (2017).

The denial of a motion for acquittal is reviewed de novo. *United States v. Tucker*, 133 F.3d 1208, 1214 (9th Cir. 1998).

C. Evidence at Trial Was Insufficient to Prove Beyond a Reasonable Doubt that Mr. Portillo Knew There Were Narcotics in His Truck

The decision of the Ninth Circuit was based on the fact that Mr. Portillo was the driver, owner and sole occupant of the vehicle which contained the narcotics in “an elaborate non-factory compartment;” The Ninth Circuit also noted that jurors could infer knowledge from possession of a large quantity of drugs.

What the Ninth Circuit failed to consider, as discussed in greater length below, was other evidence which cast significant doubt on whether Mr. Portillo had the requisite knowledge of narcotics in his vehicle when he crossed the border into the United States.

Knowledge is an element of the offenses at issue. The district court instructed the jury as follows as to this element:

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt. First, the defendant knowingly brought cocaine into the United States; and second, the defendant knew it was cocaine or some other prohibited drug. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake or accident.

Knowledge can be inferred in some circumstances. For example, in *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989), *overruled on other grounds, in part, by United States v. Hernandez-Estrada*, 749 F.3d 1154

9th Cir. 2014), appellants were charged with a conspiracy to distribute cocaine and heroin and with possession with intent to distribute heroin and cocaine. The Ninth Circuit held that price, quantity and quality of the narcotics was relevant to establish knowledge of the presence of the contraband in the car as well as intent to distribute the contraband. *See also, United States v. Kearney*, 560 F.2d 1358, 1369 (9th Cir. 1977). The facts in *Sanchez-Lopez* stand in sharp contrast to the facts in Mr. Portillo's case. For example, in *Sanchez-Lopez*, when the vehicle was stopped, the officer discovered the contraband in the backseat and observed the strong odor of perfume which, in his experience was indicative of black tar heroin which has an odor used to mask the presence of contraband. Under these circumstances, the Ninth Circuit held the evidence was highly relevant to establish knowledge of the existence of the contraband as well as to substantiate the conspiracy charge.

The same rationale was used by the Ninth Circuit in *United States v. Humphrey*, 759 F.2d 743, 751 (9th Cir. 1985) where a cabin containing a large quantity of marijuana reeked with the odor of marijuana. In such a circumstance, this Court held it was "reasonable to infer that the occupants were engaged in more than mere knowing presence" supporting an inference that the members of the crew possessed contraband with intent to distribute it and that they participated in a conspiracy to do so"). Both of these cases

involved a situation where a strong odor of narcotics supported an inference that the defendant(s) knew of the presence of the narcotics because they could smell them. No such evidence of odor existed in Mr. Portillo's case.

Furthermore, unlike the circumstances in *Gaylor v. United States*, 426 F.2d 233 and *Bettis v. United States*, 408 F.2d 563, 566 (9th Cir. 1969) where the appellants had undisputed dominion of the vehicle and its contents, at least two people (Portillo's boyfriend Jesse Heredia Mancera and Heredia's sister) had access to and drove the truck, at times when petitioner Portillo was not present.

During the entire time he was at the border, at the Sentri lane, as well as at secondary and in the detention room, Mr. Portillo was calm and gave no indication that he knew there were narcotics in his truck. (12/1/16 RT 78) Although Officer Gonzales testified at trial that Mr. Portillo appeared nervous and his hands were shaking, his report made no mention of any alleged nervousness. (11/30/16 RT 32-33) At the time, he suspected Mr. Portillo was nervous was because he was lost and confused. (11/30/16 RT 32)

Not only was Mr. Portillo calm during the entire time of his detention, in all of the text messages, Facebook messages, incoming and outgoing calls, contact numbers found on his phone, nothing was found indicating where those

drugs were going or where they came from or anything that would have tied Mr. Portillo to those drugs. (12/1/16 RT 36)

The government's theory and argument to the jury was that this was a sophisticated scheme to bring a large load of drugs of great value into this country. It is inconceivable that in such an allegedly sophisticated scheme, a drug trafficking organization would entrust a very large load of cocaine to a person who was so naive as to drive into a Sentri lane where he would be sure to be referred to secondary for unauthorized use of a Sentri lane. The uniqueness of such a circumstance was pointed out at trial by Officer Gonzalez who testified that in a given day, he refers multiple cars to secondary from the Sentri lane and that in his five years experience, this is the only vehicle he has referred to secondary that did not have a Sentri card and had drugs in the vehicle. (11/30/16 RT 40) What is logical is that Javier Portillo did not know there were drugs hidden in his truck and was, in fact, a "blind mule."

Facts from which courts have generally held the defendant has knowledge of the narcotics in the vehicle include sole dominion, odor, visible narcotics in the vehicle and sometimes nervousness. No such evidence existed in Mr. Portillo's case. During the time he was in Mexico, he was not the sole person who drove the vehicle, there was no odor detected when the car was inspected at secondary, the narcotics were not visible to him, and he was calm

during the entire sequence of events from his arrival at Sentri lane 5 through the time he was in detention. Neither his behavior nor the circumstances surrounding the vehicle supported an inference of knowledge.

In *Jackson v. Virginia, supra*, 443 U.S. at 313-320, this Court held that the Due Process Clause of the 14th Amendment is violated by conviction of a crime without sufficient evidence that each element has been proven beyond a reasonable doubt. It is not enough that Javier Portillo was the driver of the vehicle and its sole occupant at the time he mistakenly proceeded to the Sentri lane. The evidence must show beyond a reasonable doubt that he acted with the knowledge and intention of importing narcotics into the United States and in that respect, the evidence failed.

CONCLUSION

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

December 10, 2018

Respectfully submitted,

/Elizabeth A. Missakian
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