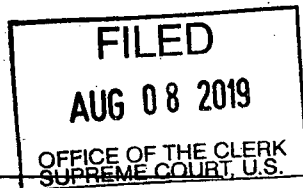


NO. 19-5983

ORIGINAL

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IN THE  
SUPREME COURT OF THE UNITED STATES



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ALEJANDRO LLAMAS-DELGADO,  
Appellant-Petitioner,

V.

UNITED STATES OF AMERICA,  
Respondent.

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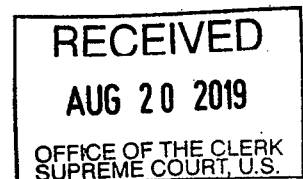
ON PETITION FOR WRIT OF CERTIORARI TO  
THE EIGHTH CIRCUIT COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI

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### QUESTION PRESENTED FOR REVIEW

Mr. Llamas-Delgado ("Petitioner") is serving a 300 month sentence pursuant to 21 U.S.C. § 841(a)(1) and 846, based on violations for conspiracy to distribute 500 grams or more of methamphetamine and 500 grams or more of cocaine, and (2) possession with intent to distribute 500 grams or more of cocaine.

#### The Question Presented is:

Whether the lower court's decision conflicts with Supreme Court and other circuit precedent concerning the government's burden to prove the evidence was sufficient in a conspiracy under 21 U.S.C. §§ 841 and 846, where the only evidence submitted at trial supported Petitioner's mere presence and or association with alleged conspirators?

LIST OF PARTIES

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

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[Un]published opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered June 26, 2019, denying direct appeal. (Appendix A). No petition for rehearing was filed in this case.

### JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided this case and affirmed the sentence and conviction, was June 26, 2019. A petition for rehearing or rehearing en banc was not filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have Assistance of Counsel for his defense.



# I. STATEMENT OF THE CASE AND RELEVANT FACTS

In June 2017, a grand jury indicted Llamas on two counts: (1) conspiracy to distribute 500 grams or more of methamphetamine and 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; and (2) possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a)(1). At trial in December 2017, a jury convicted Petitioner on both counts.

The district court sentenced Mr. Llamas to 300 months of imprisonment. (See Appendix A, at pp. 6). Mr. Llamas filed a timely appeal.

## Direct Appeal:

On or about August 31, 2018, counsel, Gary R. Wolf filed Petitioner's direct appeal to the Eighth Circuit Court of Appeals. Counsel presented Two issues: "Appellant's Conviction Should Be Reversed Because The Evidence Against Him Was Legally Insufficient Or, In The Alternative, Appellant Should be awarded a New Trial Because The Weight Of Evidence Leaves The Appellate Court With The Firm Belief That Justice Requires a New Trial. (See Appendix B, at ii). Counsel argued in sum: "At trial the government called nine witnesses. The evidence against Appellant was circumstantial, albeit extensive in the range of investigative techniques employed, except for the testimony of government informant Alberto Lopez, who offered his testimony in exchange for assisting the government and whose testimony was direct evidence against Appellant." Id. at 20-28.

On or about June 26, 2019, the Eighth Circuit affirmed Petitioner's sentence on appeal. The Court analyzed Petitioner's

sufficiency of the evidence under the umbrella that to "establish a defendant's membership in a conspiracy, the Government needs to prove (1) the existence of an agreement among two or more people to achieve an illegal purpose, (2) the defendant's knowledge of the agreement, and (3) that the defendant knowingly joined and participated in the agreement."

(See Appendix A, Opinion at pp. 7). The Court ultimately ruled:

The evidence of Llamas's guilt was overwhelming. First, Llamas participated in using a modified Mini Cooper to transport drugs. Llamas protest that evidence of his role was primarily based on the confidential informant's testimony, but his participation in picking up the Mini Cooper confirms his role in that transaction. Second, police officer's surveillance of the outlet mall and subsequent discovery of drugs with Winter could allow a reasonable jury to infer that Llamas sold drugs to Winter. Third, Llamas was reportedly present at the Dupont House where police officer's found drugs (and no evidence anyone lived there). While this is not an exhaustive recollection of the evidence against Llamas, this evidence alone prevents any reasonable argument that the evidence was insufficient to convict Llamas."

Id. at pp. 8. See also United States v. Alejandro Llamas-Delgado, Case No. 18-2088 (June 26, 2019). Petitioner did not forego rehearing or rehearing en banc. This prayer for writ of certiorari now follows.

### III. REASON FOR GRANTING THE WRIT

THE LOWER COURT'S DECISION CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT PRECEDENT CONCERNING THE GOVERNMENT'S BURDEN TO PROVE THE EVIDENCE WAS SUFFICIENT IN A CONSPIRACY UNDER 21 U.S.C. §§ 841 AND 846, WHERE THE ONLY EVIDENCE SUBMITTED AT TRIAL SUPPORTED PETITIONER'S MERE PRESENCE AND ASSOCIATION WITH ALLEGED COCONSPIRATORS.

A. The Eighth Circuit's decision in this case is in error in several respects, and conflicts with decisions of the Supreme Court, and other circuits. See S.Ct. R. 19(a)(c). Specifically, the Eighth Circuit quoted the law to establish membership in a conspiracy correctly. (See Appendix A, at pp. 7). However, the Court used the incorrect standard when it ruled:

The evidence of Llamas's guilt was overwhelming. First, Llamas participated in using a modified Mini Cooper to transport drugs. Llamas protest that evidence of his role was primarily based on the confidential informant's testimony, but his participation in picking up the Mini Cooper confirms his role in that transaction. Second, police officer's surveillance of the outlet mall and subsequent discovery of drugs with Winter could allow a reasonable jury to infer that Llamas sold drugs to Winter. Third, Llamas was reportedly present at the Dupont House where police officer's found drugs (and no evidence anyone lived there). While this is not an exhaustive recollection of the evidence against Llamas, this evidence alone prevents any reasonable argument that the evidence was insufficient to convict Llamas."

Id. at 8.

The Supreme Court held in Paoli v. United States, 1 L.Ed. 2d 278, 352 U.S. 232 n.7 (1957), that "[p]articipation in a criminal conspiracy may be shown by circumstantial as well as direct evidence. See, e.g., Blumenthal v. United States, 332 U.S. 539, 557 (1947). The Court went on to state in footnote 7 that: "The existence of the conspiracy and each defendant's connection with it must be established by individual proof based

upon reasonable inference to be drawn from such defendant's own actions, his own conduct, his own declarations, and his own connection with the actions and conduct of the other alleged co-conspirators.

"To find any defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of any co-conspirator is insufficient. Mere association of one defendant with another does not establish the existence of a conspiracy. Id. at n.7.

In Gorin v. United States, 312 U.S. 19, 85 L.Ed. 488, 61 S.Ct. 429 (1941), the Court said "especially misleading to a layman are the overt act allegations of a conspiracy. Such charges are often, as in this indictment, mere statements of past association or conferences with other persons, which activities apparently are entirely harmless standing alone.

In this case, the government's key witness at trial was Lopez, who admitted after lying to the jury, that "he had not had contact with Petitioner Llamas since 2014. T. 312. There was no evidence that supported why or how Lopez could recognize Petitioner's voice after three years when he claim to have heard Petitioner's voice only on a cell phone from across the country momentarily in 2014. (See Exhibit B, Appellant Brief at pp. 18).

Lopez claimed to have been a friend of Petitioner's back in Mexico when they were kids. Yet, the government presented no corroboration of any aspect of this claim. Additionally, when defense counsel had Petitioner's brother and mother stand in the courtroom, Lopez testified he did not recognize them. Id.

Lopez was also forced to admit that Petitioner had never told him of the Mini Cooper or the plan to use it to transport drugs. T. 320. He testified that he learned of all this alleged conspiracy from Omar Garcia-Ornelas, who actually had Lopez make the arrangement for the transport of the Mini Cooper. T. 303.

None of the people cited by Lopez were witnesses at trial, and no corroborating witnesses or document were offered by the government to support Lopez' tale, or the government's position that Petitioner Llamas sold drugs, or actively participated in the conspiracy.

Every circuit to address this issue disagree, and or conflict with the Eighth Circuit's decision that Llamas' repeated presence at the Dupont House, with other alleged conspirators picking up the Mini Cooper, and or his mere association with Winter's establishes sufficient evidence to convict Llamas. Specifically, the Second Circuit held that "[p]roof that the defendant simply associated with conspirators is insufficient." United States v. Rosa, 17 F.3d 1531, 1543 (2d Cir. 1994). See also, United States v. Rodriguez, 392 F.3d 539, 545 (2d Cir. 2004) ("Proof that the defendant knew that some crime would be committed is not enough.") (citations and quotation marks omitted). [A]bsent evidence of purposeful behavior, mere presence at the scene of a crime, even when coupled with knowledge that a crime is being committed, is insufficient to establish membership in a conspiracy...."<sup>1</sup>

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1. Association means that the defendant shared in the criminal intent of the principal." Participation means that the defendant engaged in some affirmative conduct designed to aid the venture. Although relevant, mere presence and association are insufficient to sustain a conviction of aiding and abetting." United States v. Salazar, 66 F.3d 723, 729 (5th Cir. 1995).

The Fifth, Tenth, and Eleventh Circuit's also agree with the Second Circuit on this topic. See United States v. Carrillo, 660 F.3d 914, 929 (5th Cir. 2011) (mere presence at the scene of an event or association with certain other persons is insufficient to prove a conspiracy); United States v. Richard, 969 F.2d 849, 856 (10th Cir. 1992) (quoting United States v. Espinosa, 771 F.2d 1382, 1397 (10th Cir. 1985)) ("[M]ere proximity to illegal drugs, mere presence on the property where they are located, or mere association with persons who do control them, without more, is insufficient to support a finding of possession."); and United States v. Villegas, 911 F.2d 623, 629 (11th Cir. 1990) (A defendant's "mere presence" at the scene of a crime or "mere association" with conspirators, however, is insufficient on its own to establish knowing participation in a conspiracy).

Notably, the Seventh Circuit also agree that even though a person is present inside of a house for unidentified periods of time, his presence along adds little to a case to support the sufficiency of the evidence when proving membership in a conspiracy. "Mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession. United States v. DiNovo, 523 F.2d 197, 200-01 (7th Cir. 1975) (internal citation omitted).<sup>2</sup>

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2. "Mere proximity to the drugs, mere presence on the property where they are located, or mere association with the person who does control the drugs on the property is insufficient alone to establish [membership in conspiracy]. United States v. Mainor, 393 F.3d 10, 18 (3rd Cir. 2010);

The lower courts inference that the evidence was sufficient to support a conspiracy conviction where Petitioner Llamas merely associated with individuals who allegedly were involved in bad acts was impermissibly speculative, especially where the Court has held that a "strong suspicion that someone is involved in a criminal activity is no substitute of guilt beyond a reasonable doubt." This is so because the evidence of Llamas' mere association and presence around people suspected of being involved in drug trafficking without more, could not support a reasonable finding of guilt because it could not satisfy the "state of near certitude" required by Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979). Even if the lower court assumed that Llamas was seen at the Dupont residence, or with individuals retrieving the Mini Cooper, the Supreme Court and other circuits have undeniably held that "his mere presence is not sufficient, by itself, to sustain his conviction. Id.

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United States v. Tyson, 653 F.3d 192, 210 (3d Cir. 2011) (holding defendant's mere presence at scene is insufficient evidence of membership in conspiracy). "A defendant's guilty knowledge and voluntary participation may be inferred from surrounding circumstances," including a close relationship between alleged conspirators, but participation requires more than 'mere association with conspirators." United States v. Brown, 332 F.3d 363, 372-73 (6th Cir. 2003) (internal quotation marks omitted). A buyer-seller relationship with others is not enough, but evidence of a conspiracy or evidence linking a particular defendant to a conspiracy may be provided by: repeated sales..." Id. at 373.

THIS CASE IS AN IDEAL VEHICLE FOR THIS COURT TO ADDRESS THE QUESTION PRESENTED. THIS COURT NEEDS TO CLARIFY ITS HOLDING ON CONSPIRACIES.

This case is the ideal vehicle to both enforce and clarify the whether an individual who merely associates with, or is merely present where people are doing wrong automatically makes them a coconspirator when none of the evidence supports a defendant repeatedly sold drugs to anyone. The opinion of the court of appeals defies Supreme Court precedence, as well as other circuits, by endorsing the continued viability of mere associations with alleged bad actors, rather than an active participation, qualify as enough to prove membership in conspiracies. This Court can clearly address these questions in the present case.

The law of conspiracy in drug trafficking case is straight forward. It has been agreed upon hundreds of times by every circuit that proof that the defendant simply associated with conspirators is insufficient. Rosa, at 1543. Properly limited and construed, this Court should grant review in this case to clarify whether mere presence and or association with bad actors is sufficient to determine a defendant is a member of a conspiracy.

#### CONCLUSION

For the reasons stated above. Petition respectfully requests that this Court issue a writ of certiorari.

RESPECTFULLY SUBMITTED this 8 day of August, 2019.

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