NO. _____

In the
Supreme Court of the United States

JUSTIN MARQUES HENNING,
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

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July 2, 2020

QUESTION PRESENTED

After sitting through the trial of Petitioner Justin Henning and his co-defendants, the district court granted Henning's motion for acquittal on the handful of counts on which the jury had convicted him, calling the evidence against him the "thin[nest]" it had ever seen. After the government appealed, the United States Court of Appeals for the Ninth Circuit overturned that decision in part, reversing the grant of acquittal but affirming the grant of a new trial. The Ninth Circuit did so based only on evidence of Mr. Henning's mere presence near the scene of the crime. Every other federal court to have considered the issue has concluded that mere presence alone is not enough to sustain a criminal conviction. State courts have also consistently applied the same rule. The question presented is:

Whether a criminal defendant may be convicted based solely on evidence of his mere presence near the scene of the crime, without any evidence that the defendant participated in the crime.

PARTIES TO THE PROCEEDING

Justin Henning, petitioner on review, was the appellee below.

The United States of America, respondent on review, was the appellant below.

RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit, listed here in chronological order:

- *United States v. Henning*, No. CR 16-029-CJC-7 (C.D. Cal. Dec. 20, 2017);
- *United States v. Henning*, No. 18-50005 (9th Cir. Nov. 21, 2019), *reported at* 785 F. App'x 430.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

The district court in this case said, "I've had a lot of cases, but I've never had the evidence be so thin," and granted Petitioner Justin Henning's motion for acquittal of three robbery-related crimes. Supp.App.2. Viewed in the Government's favor, that evidence showed at most that Henning knew about the robbery and was present in its general vicinity when it occurred. But there was no evidence that Henning agreed to participate in the robbery or took part in its commission. Because of that, the district court correctly granted Henning's motion for acquittal and conditionally granted a new trial. App.30–31.

After the government appealed, the Ninth Circuit reversed the district court's judgment of acquittal. Even in doing so, however, it didn't disagree with the district court's conclusion that the evidence showed at best Henning's mere presence near the robbery. In fact, the Ninth Circuit expressly acknowledged there were "significant issues with the evidence." App.4. But it still found that evidence sufficient to support the verdict, allowing Henning to be retried for crimes the Government did not prove he committed beyond a reasonable doubt.

That decision flouts this Court's holding that "[t]o be present at a crime is not evidence of guilt." *United States v. Williams*, 341 U.S. 58, 64 n.4 (1951). Ten other federal courts of appeals—and multiple state appellate courts—have similarly held that evidence of "mere presence" at the scene of a crime is insufficient to prove guilt beyond a reasonable doubt. Instead, the Government must introduce some evidence that the defendant actively participated in the crime. Although

the government did not do so here, the Ninth Circuit reversed Henning's acquittal anyway.

The Ninth Circuit's decision is indefensible and should be summarily reversed. At a minimum, it creates one Circuit split and aggravates another, justifying this Court's review. *See* Sup. Ct. R. 10(a), (c). The first split is over the mere presence rule, while the second is over an approach to insufficiency-of-the-evidence review called the "equipoise rule." Under that rule, a defendant cannot be convicted if the evidence supports guilt and innocence equally. The Ninth Circuit has rejected that approach, while other Circuits have adopted it. This case clearly presents both splits. Given the ever-expanding scope of federal criminal law, the Ninth Circuit's decision exposes countless innocent Americans to prosecution and conviction for being not even at, but simply near the wrong place at the wrong time.

This Court should reject that outcome and resolve the circuit split created by the decision below. It should reverse the Ninth Circuit's judgment and reinstate Henning's acquittal, either summarily or after briefing and argument.

OPINIONS BELOW

The Ninth Circuit's memorandum disposition is reported at 785 F. App'x 430. App.1–4. That court's order denying rehearing is not reported. App.32–33. The district court's decision granting petitioner's motion for acquittal and conditional motion for a new trial is not reported. App.5–31.

JURISDICTION

The Ninth Circuit issued its decision on November 21, 2019. Petitioner timely sought rehearing and rehearing en banc, which the Ninth Circuit denied on February 5, 2020. This Court issued an order on March 19, 2020, extending all deadlines for the filing of a petition for certiorari to 150 days from the denial of a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment, U.S. Const. amend. V, provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The substantive statutes under which Henning was convicted, 18 U.S.C. § 924(c) (possession of a firearm during drug-trafficking offense) and 18 U.S.C. § 1951(a) (Hobbs Act Robbery), are reproduced at App.35–39.

Federal Rule of Criminal Procedure 29, governing motions for judgment of acquittal, is reproduced at App.40–41.

STATEMENT OF THE CASE

A. Factual Background

This case arose out of eleven robberies targeting watch and jewelry stores in Southern California. The relevant indictment charged that the robberies were committed by a large, fluid group of co-conspirators

that allegedly included Henning.[1] App.6–7. Although the Government accused Henning of being involved in several robberies, there was virtually nothing connecting him to those other robberies, and the Ninth Circuit's decision relied on evidence related to just one: the February 29, 2016 robbery of Ben Bridge Jeweler in Torrance, California's Del Amo Fashion Center (the "Del Amo robbery"). App.7.[2]

1. At trial, the Government's primary evidence related to the Del Amo robbery was testimony from two cooperating witnesses ("CW1" and "CW2"). Their testimony, viewed in the Government's favor, showed

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[1] The other charged co-conspirators were Keith Walton (nickname "Green Eyes"), Robert ("Bogart") Johnson, Evan ("Macc") Scott, Jameson ("J Bone") Laforest, and Jeremy ("Widget") Tillett. The indictment also identified, but did not charge, Darrell ("D") Dent, Kenneth ("Lil K.O.") Paul, Dominic ("Bones") Callaway, Devan ("Snoop") Howard, Mychael ("Poncho") Craig, Wilson ("Junior Bogart") Elima, Cornell ("Bully Bad Azz") Stephen, Shane ("Hang Out") Lewis, Brandon White, Vincent Haynes, Mariah Smith, Stanley ("Stan") Ford, Marshawn ("Junior Manchester") Marshall, and Michael ("Ave Boy") Germeille. Gov't Excerpts of Record ("GER") 58–59.

[2] The ten other robberies described in the indictment were: (1) the August 3, 2014 robbery of Prestige Jewelers in Manhattan Beach, (2) the August 24, 2016 robbery of the Rolex Boutique Geary's in Century City, (3) the October 21, 2015 robbery of Frederic H. Rubel Jewelers in Mission Viejo, (4) the January 2, 2016 attempted robbery of Ben Bridge Jeweler in Santa Monica, (5) the January 22, 2016 robbery of Manya Jewelers in Woodland Hills, (6) the February 7, 2016 robbery of Ben Bridge Jewelers in Thousand Oaks, (7) the February 15, 2016 robbery of Westime in West Hollywood, (8) the February 22, 2016 planned robbery of Glendale Galleria, (9) the March 22, 2016 robbery of Westime in Malibu, and (10) the April 24, 2016 robbery of Ben Bridge Santa Monica. GER 61–78.

that Henning knew about the Del Amo robbery and may have been present somewhere in its vicinity when it occurred. But the CWs did not testify that Henning participated in the robbery in any way, and no other witness implicated Henning in its commission. Nor for that matter was there any physical evidence tying him to the crime.

a. CW1 testified about the planning of the robbery. He testified that Keith Walton planned the robbery, while Robert Johnson recruited participants and assigned them roles. GER 153–54, 173. No one testified that Henning planned the robbery, recruited participants, or assigned roles.

CW1 testified that, on February 25, 2016, he discussed the robbery with Walton, CW2, Darrell Dent, and Jameson Laforest at Walton's house. Supp. Excerpts of Records ("SER") 710–14. At Walton's suggestion, they "finish[ed] the conversation" in a parking lot. SER 717. No evidence placed Henning at these meetings.

After the February 25 meeting, CW1 scouted the Del Amo store with Laforest, Shane Lewis, and another unidentified co-conspirator. SER 719–20. No one testified that Henning was present then either.

b. According to CW1, Johnson assigned participants their roles at a meeting one day later, on February 26. SER 729–30. CW2 denied that Henning attended the February 26 meeting. SER 1563, 1578–79. CW1 testified that Henning was present but "didn't say nothing." SER 729, 732.

At the meeting, Johnson assigned CW1 to be the getaway driver, Evan Kwan Scott to be the gunman, and CW2 and Shane Lewis to steal watches. SER 729–

30. No witness testified that Johnson assigned Henning a role at the meeting. SER 729–30, 1567. Nevertheless, CW1 said he "was told" that Johnson had assigned Henning the role of "emergency" backup driver. SER 603–04, 732. CW2 testified that Jameson Laforest told him Henning would be a backup driver, but he admitted he had no independent knowledge of Henning's role. SER 1579, 1701–03. No one testified that Johnson assigned Henning any role during any meeting and no one testified that Henning accepted the role. Indeed, no one testified that Henning even knew the role had been assigned to him. App.8.

c. CW1 testified that after the February 26 meeting, its attendees traveled to the Del Amo mall. SER 733. They waited outside the mall while Stanley Ford went inside to scope out Ben Bridges Jeweler. SER 734. When he returned and said a girl was sitting by the store, the robbery was called off. SER 735–36. The decision when to carry out the robbery was made by Johnson, Scott, Lewis, and CW2. SER 735–36, 1575–76. No one testified that Henning was involved in that decision.

Indeed, there was no evidence that Henning did anything to participate in this aborted robbery. For instance, no one testified that Henning scouted the store or helped decide whether to proceed or not. And though CW1 testified that Henning drove to the Del Amo mall, he also testified that Henning was not "with [him]" when "Stan went inside the store." SER 733–34.

d. Three days later, on February 29, Johnson, Laforest, Scott, Ford, Lewis, Germeille, CW1, and CW2 met in a park. SER 740, 1577–79. Henning also

attended, arriving in his own car. SER 1579. CW2 had never met Henning before that day. SER 1578–79.

CW1 and CW2 differed as to what, if anything, was discussed at the meeting. CW1 said Johnson saw no need for further discussion, while CW2 said Johnson discussed "[t]he same thing we discussed on Friday." SER 741, 1578. Yet again, no one testified that Henning said or did anything at the meeting.

2.a. The Del Amo robbery occurred after the February 29 meeting. According to CW2, Germeille drove CW2 and two others to the Del Amo mall. SER 1580. The three entered Ben Bridges Jeweler, where one pulled a gun while the other two grabbed watches. SER 1580–81. CW1 then picked up the three men and drove them to a parking lot, where they handed off the stolen goods to another co-conspirator. SER 743–48. From there, CW1 drove to meet Germeille. SER 748–49, 1584–85. He then drove CW2 and Lewis to the freeway, where police pulled them over and arrested them. SER 1585–86.

None of the robbery participants knew where Henning was during any of that. Although CW1 said Henning drove to the mall, he admitted he didn't know where Henning was during the robbery. SER 742, 1206. Nor did Henning or his car appear in any of the security video footage of the mall's surroundings. Neither CW1 nor CW2 ever saw Henning again after the February 29 meeting. SER 1190–91, 1643, 1703. Indeed, neither could even reach Henning because they did not have his phone number. SER 1186–87, 1206, 1703. Thus, according to the evidence, if Henning was supposed to be the emergency back-up

driver, he was an emergency back-up driver who could not be reached directly in case of an actual emergency.

Indeed, before the robbery, CW1 added other robbery participants' numbers to his phone contacts, but he did not add Henning's number. SER 612, 614, 1186–87. And while Laforest gave CW1 a list naming the participants in the robbery and listing their phone numbers, Henning was not on that list. SER 753–56; TE 404. Simply put, there was no evidence that anyone took any steps to make sure that those carrying out the robbery could reach him in case of emergency.

b. Without any witness testimony placing Henning at the Del Amo mall during the robbery, let alone taking any action to carry it out, the Government relied on testimony from a law-enforcement agent that a cell phone associated with Henning connected to a cell tower "in the vicinity" of the mall during the time of the robbery. SER 3475–83. But the agent could not place the phone in any specific geographic range. SER 3509. He admitted that the distance between the cell tower and the phone could be up to two miles, and there was no evidence that could place Henning at any particular location within that range. SER 3509. Nevertheless, the district court gave the Government the inference that Henning was in the vicinity based on this evidence. GER 34.

During the robbery, the phone associated with Henning called numbers linked to Laforest and Johnson. GER 34. But there was no evidence of what anyone said on those calls. GER 30, 33; SER 3444, 3509, 3514.

B. Procedural History

1. The Government indicted Henning on seven counts, three of which related to the Del Amo robbery, and four of which related to other robberies. App.6.

After 18 days of trial and four days of deliberation, the jury acquitted Henning on all four counts related to robberies other than the Del Amo robbery. App.7. The jury convicted Henning on the three counts related to the Del Amo robbery: robbery and conspiracy to commit robbery, in violation of 18 U.S.C. § 1951(a), and aiding and abetting the brandishing of a gun in the robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), 2(a). App.24–25.

2. Henning moved for an order of acquittal and, in the alternative, for a new trial. App.30 n.9.

a. At the hearing on Henning's motion, the district court summarized its view of the evidence against him: "I've had a lot of cases, but I've never had the evidence be so thin." GER 37.

The district court accepted that Henning attended meetings related to the Del Amo robbery. GER 38. But the court observed, "[t]he way the testimony was developed, . . . I don't know where Mr. Henning is. I don't know if he can hear anything that's being said. What I do know for certain is that Mr. Henning never said anything or did anything. . . . The other defendants you have evidence that they're saying things at these meetings, they're giving directions, they're bringing a firearm, they're bringing tools and equipment. I don't have that with respect to Mr. Henning." GER 27–28. Indeed, the Government conceded that Henning did not actively participate in any of the meetings. GER 30, 33.

And although there was no direct evidence of it, the district court also gave the Government an inference that Henning "was in the general vicinity of the [Del Amo] robbery" and spoke to Johnson and Laforest on his cell phone during the robbery. GER 34. But the court found, and the Government conceded, that there was no evidence of what anyone said during the calls between Henning, Johnson, and Laforest. GER 30, 33–34. As a result, the court lacked "evidence that [Henning]'s doing or saying things showing intentional participation" in the robbery. GER 34. There was nothing to support even an inference going that far.

b. After the hearing, the district court issued an order granting Henning's motion for acquittal. App.30 n.9.

The district court held that the evidence was insufficient to prove beyond a reasonable doubt that Henning participated in the Del Amo robbery. App.30. Based on the evidence that Henning attended two planning meetings[3] and was in the general vicinity of the robbery, the court found that "a rational trier of fact could conclude that Henning was a knowing spectator of the crime." App.17. But that under well settled law was not enough: "Mere presence, affiliation, and knowledge are not sufficient to prove guilt beyond a reasonable doubt." App.6.

Instead, "the Government was required to present evidence that Henning said or did something to prove

[3] Despite the conflicting testimony of CW1 and CW2 on the point, the court gave the Government the inference that Henning was at the first planning meeting. GER 38.

that he intentionally participated or joined in the conspiracy, or said or did something to prove that he knowingly aided and abetted the Del Amo robbery at which a firearm was brandished." App.6. Because the Government "failed to present such evidence," the court entered a judgment of acquittal on all three counts of conviction. App.6.

In the alternative, the district court also granted Henning's motion for a new trial. App.30 n.9.

3. The Government appealed. It argued that the evidence, viewed in its favor, proved Henning's guilt beyond a reasonable doubt.

Notably, the Government dismissed the cases the district court had relied on to find that Henning could not be convicted based solely on evidence of his "mere presence" at the robbery. The Government argued that those cases had been "overruled" or "repudiated" by the Ninth Circuit's later decision in *United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010) (en banc). CA9 Gov't Br. 41–43 (Doc. 14). *Nevils* rejected an approach to insufficiency-of-the-evidence review, sometimes called the "equipoise rule," under which a defendant cannot be convicted if the evidence supports guilt and innocence equally. 598 F.3d at 1166–67. Under *Nevils*, the Government argued, the evidence against Henning was sufficient to convict.

4.a. A panel of the Ninth Circuit reversed the district court's judgment of acquittal on all three counts of conviction. App.4.

The panel relied solely on evidence related to the Del Amo robbery. App.3.[4] It reversed Henning's acquittal on the robbery count based on three pieces of evidence: (1) the CWs' testimony "that Henning was the 'emergency pickup' or 'extra driver'" even though no one testified that he said or did anything to indicate that he had taken on that role; (2) Henning's attendance at "a planning meeting shortly before the Del Amo Mall Robbery at which individual roles were discussed," even though no one testified that he said anything about participating in the robbery; and (3) cell phone records showing "that Henning's car was in the vicinity of the Del Amo mall at the time of the robbery and he was in contact with several of the co-conspirators"—although not with the conspirators who were carrying out the robbery, who did not even have Henning's number. App.2–3.

The panel reversed Henning's acquittal on the conspiracy count because "Henning attended two meetings at which the [Del Amo] robbery was planned" and "was near the mall and in contact with co-conspirators when the robbery occurred." App.3. The court also found that "Henning drove to the Del Amo mall on one occasion with co-conspirators when the robbery was aborted." App.3. Finally, the panel reversed Henning's acquittal on the firearm count because of evidence that "Henning attended the first planning meeting where a gun was present and its

[4] The Government had argued that Henning could be convicted of conspiracy to commit the Del Amo robbery based on evidence related to robberies Henning had not been convicted of or even indicted for. CA9 Gov't Br. 50–59 (Doc. 14). The panel did not reach that issue.

potential use in the [Del Amo] robbery was discussed." App.3.

The panel did not claim that any of this evidence showed anything more than Henning's knowing presence near the scene of the Del Amo robbery. Indeed, the panel cited *Nevils*, the case the Government argued had overruled the cases prohibiting conviction based on "mere presence" evidence. App.2.

b. Despite reversing Henning's acquittal, the panel acknowledged that there were "significant issues with the evidence underlying the verdict." App.4. "The primary pickup driver," the panel noted,

> did not know where Henning was during the robbery and did not have Henning's phone number. Henning's name and number were not written on a piece of paper listing the robbery participants found in the primary pickup driver's car. There was no footage of Henning's car in the parking lot of the mall around the time of the robbery, and there was conflicting testimony about whether Henning even attended the first planning meeting.

App.4.

For that reason, the panel affirmed the district court's grant of a new trial. App.2. The Government has expressed a clear intent to retry Henning.

5. Henning timely petitioned for rehearing and rehearing en banc. The petition argued the panel had erroneously reversed Henning's acquittal based solely on evidence of his presence near the scene of a crime. CA9 Pet. 5 (Doc. 81). That error, Henning explained,

created a split with other Circuits that have reversed convictions based on similar "mere presence" evidence. CA9 Pet. 12–13 (Doc. 81).

The Ninth Circuit summarily denied Henning's petition. App.33. Although Henning's argument was clearly stated in the petition, the panel did not amend its decision to clarify that the evidence it relied on showed anything more than Henning's "mere presence" near the Del Amo robbery, nor did it do so in the order denying the petition for rehearing.

This petition follows.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Conflicts With Decisions of This Court and Every Other Court of Appeals

Until this decision, it was hornbook criminal law that "mere presence at the scene of the crime," even together with "mental approval of the actor's conduct," is not enough to support criminal liability. 2 Wayne R. LaFave, Subst. Crim L. § 13.2(a) (3d ed. 2019) (collecting state court decisions and describing the rule as "[q]uite clear[]"). Simply put, it's not enough to be a lookie-loo, even one who knows and approves of what will happen. By allowing Henning's conviction on evidence showing at most knowing presence near the scene of a crime, the Ninth Circuit's decision conflicts with the decisions of this Court, every other federal court of appeals, and every state to have addressed the issue. It also adds to another circuit split.

1. This Court Has Held That Evidence of Mere Presence Cannot Support a Conviction

Since the nineteenth century, this Court has consistently recognized that a defendant's guilt can be inferred from his presence at the scene of a crime only if that presence is intended to assist the others in committing the crime. *Hicks v. United States*, 150 U.S. 442 (1893). Thus, "[i]n order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). Criminal liability therefore requires, at a bare minimum, affirmative "acts or words of encouragement," done with "the intention of encouraging and abetting." *Hicks*, 150 U.S. at 449. This Court's rule could not be much clearer: To be liable as an accomplice, a person has to do *something*.

The conclusion that follows is inescapable and unambiguous: "To be present at a crime is not evidence of guilt." *Williams*, 341 U.S. at 64 n.4. Mere presence—even knowing that a crime will occur—is not enough.

2. Every Other Court of Appeals to Consider the Issue Has Held That Evidence of Mere Presence Cannot Support a Conviction

Consistent with this Court's precedent, every single federal court of appeals to have considered the issue—until the Ninth Circuit in this case—has held

that mere presence at the scene of a crime cannot sustain a conviction. That consistent line of precedent dates back nearly sixty years, holding without exception that presence alone—even knowing presence—is not enough to sustain a criminal conviction.

The Second Circuit's rule is typical: "Evidence that a person was present where an illegal act occurred is not sufficient evidence, without more, to convict him of aiding and abetting that unlawful act." *United States v. Minieri*, 303 F.2d 550, 557 (2d Cir. 1962). The rule in every other geographic Circuit is the same and has been for decades. *See, e.g.*, *United States v. John-Baptiste*, 747 F.3d 186, 206 (3d Cir. 2014) ("[M]ere presence at the scene of the crime or association with a criminal is not sufficient evidence of a conspiracy."); *United States v. Dean*, 59 F.3d 1479, 1486 (5th Cir. 1995) ("Mere presence and association alone cannot support a conspiracy conviction."); *United States v. Rutkowski*, 814 F.2d 594, 597 (11th Cir. 1987) (quoting jury instructions charging that "mere presence at the scene of the crime or mere presence in the area of where an offense is being committed or mere association with the person or persons who are violating the law is not in and of itself sufficient to support a conviction of a conspiracy"); *United States v. Francomano*, 554 F.2d 483, 486 (1st Cir. 1977) ("Mere presence . . . is not evidence of guilt."); *Bailey v. United States*, 416 F.2d 1110, 1113 (D.C. Cir. 1969) ("An inference of criminal participation cannot be drawn merely from presence; a culpable purpose is essential." (footnote omitted)).

Even when a defendant knows about the crime or knowingly associates with its perpetrators, the defendant's presence is not sufficient to convict in any Circuit other than the Ninth. *E.g.*, *John-Baptiste*, 747 F.3d at 206 ("[M]ere presence at the scene of the crime or association with a criminal is not sufficient evidence of a conspiracy."); *United States v. Rolon-Ramos*, 502 F.3d 750, 754 (8th Cir. 2007) ("[A] defendant's mere presence, coupled with the knowledge that someone else who is present intends to sell drugs, is insufficient to establish membership in a conspiracy." (internal quotation marks omitted)); *United States v. Love*, 767 F.2d 1052, 1059 (4th Cir. 1985) ("[A] criminal defendant's mere presence at the scene of the crime or his knowledge of that crime is insufficient to establish that he joined a conspiracy or aided and abetted in the commission of the crime."); *United States v. Mancillas*, 580 F.2d 1301, 1308 (7th Cir. 1978) ("[M]ere presence at the scene of the crime or mere association with conspirators will not by themselves support a conspiracy conviction."); *Francomano*, 554 F.2d at 486 ("[N]or is mere presence at the scene and knowledge that a crime was to be committed sufficient to establish aiding and abetting.").

Instead, the federal courts of appeals require proof of "the defendant's active, knowing participation" in a crime. *Love*, 767 F.2d at 1059. Thus, "[t]o be guilty of aiding and abetting the commission of a crime, the defendant must willfully associate himself with the criminal venture and seek to make the venture succeed through some action of his own." *United States v. Whitney*, 229 F.3d 1296, 1303 (10th Cir. 2000) (quoting *United States v. Anderson*, 189 F.3d 1201, 1207 (10th Cir. 1999)). Similarly, as the Sixth Circuit

has explained, "the defendant must be a participant rather than merely a knowing spectator before he can be convicted of aiding and abetting." *United States v. Winston*, 687 F.2d 832, 835 (6th Cir. 1982) (citation, alterations, and internal quotation marks omitted). And in *United States v. Miller*, 800 F. App'x 39 (2d Cir. 2020), although the Second Circuit ultimately rejected the defendant's mere-presence defense, it did so only because of the district court's instruction, which "caution[ed] [the jury] that merely knowing or acquiescing without participation in the unlawful plan is not sufficient." *Id.* at 42. These Circuits all require some action by the defendant.

In one especially relevant case, the Eighth Circuit reversed a conviction for aiding and abetting a bank robbery. *United States v. Hill*, 464 F.2d 1287 (8th Cir. 1972). On the day of the robbery, the defendant met with one of the bank robbers in an apartment. *Id.* at 1288. During that meeting, the robber said the defendant would wait on a street corner to receive guns and money after the robbery. *Id.* at 1288–89. The defendant nodded her head "like she understood what [the robber] was talking about," then left in a car with the robber. *Id.* at 1289. The Eighth Circuit held that the defendant's "presence during a portion of one of the conversations where [the robber] indicated the various parts the participants were to play in the criminal venture" was not "sufficient to make her a willful participant," even when "accompanied by [her] nod of assent." *Id.* Even her decision to leave the apartment in the robber's car, though it showed "she could be employed in the criminal venture in the manner prescribed," did not "establish[] willful participation." *Id.*

3. State Courts Hold That Evidence of Mere Presence Cannot Support a Conviction

State courts of last resort are also unanimous that mere knowing presence at the scene of a crime cannot support a conviction. 2 LaFave, Subst. Crim L. § 13.2(a). For example, the D.C. Court of Appeals held in a robbery case that "mere presence at the scene of a crime committed by someone else, even with knowledge that an offense has been committed is insufficient to sustain a conviction as an aider or abettor." *Acker v. United States*, 618 A.2d 688, 689 (D.C. 1992). And in Pennsylvania, it's long been the law that "mere presence during the crime d[oes] not constitute such aiding and abetting." *Commonwealth v. Flowers*, 387 A.2d 1268, 1270 (Pa. 1978). This longstanding rule extends westward, too: In Arizona, "mere presence at the scene of the crime does not prove guilt" and "a conviction cannot be based entirely upon the uncorroborated testimony of an accomplice." *State v. Gomez*, 432 P.2d 444, 445 (Ariz. 1967) (en banc). Other states are in accord. *See, e.g.*, *Reyes v. State*, 745 S.E.2d 738, 740 (Ga. Ct. App. 2013); *State v. Pendleton*, 759 N.W.2d 900, 907 (Minn. 2009); *State v. Banks*, 771 N.W.2d 75, 98 (Neb. 2009); *Fleming v. State*, 818 A.2d 1117, 1121–22 (Md. 2003); *Rodriguez v. State*, 813 P.2d 992, 994 (Nev. 1991); *State v. Leonard*, 355 S.E.2d 270, 272 (S.C. 1987); *State v. Johnson*, 313 S.E.2d 560, 564 (N.C. 1984); *State v. Gazerro*, 420 A.2d 816, 828 (R.I. 1980); *McGill v. State*, 247 N.E.2d 514, 518 (Ind. 1969); *State v. Irby*, 423 S.W.2d 800, 803 (Mo. 1968). Petitioner has uncovered no case to the contrary.

4. The Ninth Circuit's Decision Creates a Circuit Split by Approving a Conviction Based on Evidence of Mere Presence

The Ninth Circuit's decision affirming Henning's conviction based solely on mere presence squarely conflicts with this long line of federal and state case law. Even when viewed in the prosecution's favor, the evidence shows at most that Henning was in the vicinity of the Del Amo robbery and that he knew that it would take place. That is not enough to sustain his conviction.

Take first the evidence of Henning's presence at meetings where others planned the robberies, including one meeting "shortly before the Del Amo Mall Robbery at which individual roles were discussed." App.2–3. At best this proves that Henning knew the others would commit the robbery. The Government conceded that Henning did not actively participate in those meetings. GER 30. And though CW1 claimed Johnson assigned roles at one meeting, no witness testified that Johnson assigned Henning any role there, that Henning was aware that he had been assigned any role, or that Henning ever accepted any role. SER 729–30, 1567.

Second, the CWs testified that they had heard that "Henning was the 'emergency pickup' or 'extra driver' for the robbery." App.2. But this shows, at most, that participants other than Henning believed that Henning was a backup driver. For all we know, Henning had no idea that he was supposed to play any role. Although the Government had the burden of proof, it introduced "no evidence that Henning accepted or acknowledged this role." GER 13. Indeed,

the government introduced no evidence that the other conspirators acted as if Henning had accepted the role—none of the conspirators who actually carried out the robbery knew where Henning was or how to reach him. If Henning was the emergency back-up driver, he was an emergency driver who could not be reached in case of emergency.

And there is no evidence that Henning actually did anything as a backup driver. Indeed, there was no testimony establishing what an emergency backup driver would do in the first place. Henning did not drive anyone to or from the robbery. None of the robbers saw Henning at the Del Amo mall, and the only witnesses who testified about his purported role had no way to contact him. SER 1186–87, 1190–91, 1206, 1643, 1703. CW1 added his other conspirators to his phone contacts, but not Henning, and when other conspirators put together a list of participants and their contact information so that they could reach each other, they didn't include either Henning's name or contact information on that list. SER 612, 614, 753–56, 1186–87; TE 404. In short, the totality of the evidence introduced against Henning was much weaker than in *Hill*, where the defendant nodded, accepting her assigned role in the robbery, and then travelled with one of the robbers. 464 F.2d at 1288–89. If the evidence in *Hill* was not sufficient to show intentional participation, neither is the evidence here.

Even the cell-tower records placing Henning "in the vicinity of the Del Amo mall at the time of the robbery," App.2–3, show at most Henning's "mere presence" somewhere within a mile or two of the crime scene. Nor does the inference that Henning "was in

contact with several of the co-conspirators" establish Henning's participation in the robbery. App.3. The Government conceded that it had no evidence of what anyone said on those calls. GER 33. A jury could not conclude that the calls related to the robbery without improper speculation. *Cf. Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) ("[T]he jury may not render a verdict based on speculation or guesswork."); *United States v. Pauling*, 924 F.3d 649, 656, 657 (2d Cir. 2019) (affirming district court's order granting acquittal, and holding that courts "give no deference to impermissible speculation" but must instead "be satisfied that the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt" (quoting *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995))); *United States v. Martin*, 803 F.3d 581, 587 (11th Cir. 2015) (holding that "if the government relied on circumstantial evidence, reasonable inferences, not mere speculation, must support the conviction") (internal quotation marks omitted)). And even if the calls did relate to the robbery, that would only show, at most, that Henning knew the robbery was happening, unless there was other testimony or evidence that through these calls he intentionally participated in the robbery. And there wasn't.

The same is true of evidence that "Henning drove to the Del Amo mall on one occasion with co-conspirators when the robbery was aborted." App.3. CW1 testified about the aborted robbery, but he did not say that Henning agreed to participate or did anything in connection with it. SER 734–36. Neither did any other witness, and there was no additional

evidence about Henning's role in the aborted robbery. As with the other evidence cited by the Ninth Circuit, this evidence shows at most that Henning was aware of the robbery and present at a time when no crime was committed.

Only in the Ninth Circuit would this "mere presence" evidence be enough to convict. In every other Circuit, the district court's order of acquittal would have been affirmed. This Court should resolve this split by reversing the Ninth Circuit's decision.

5. This Case Also Implicates a Circuit Split Over the Equipoise Rule

Henning also would have been acquitted in every federal court of appeals that has adopted the equipoise rule for insufficiency of evidence. As explained, *supra* at 10–13, the equipoise rule requires acquittal when the evidence is "at least as consistent with innocence as with guilt." *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994), *as amended* (Nov. 15, 1994) (quoting *United States v. Mulheren*, 938 F.2d 364, 372 (2d Cir. 1991)). Under that rule, even if the evidence of Henning's presence at the scene of a crime were consistent with guilt, he would be acquitted because the evidence would be equally consistent with innocence.

The Ninth Circuit, however, has rejected the equipoise rule. *Nevils,* 598 F.3d at 1167. That puts the Ninth Circuit in conflict with the vast majority of circuits—the First, Second, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits—each of which has endorsed the rule. *E.g.*, *United States v. López-Díaz*, 794 F.3d 106, 111–12 (1st Cir. 2015); *D'Amato*, 39 F.3d at 1256; *United States v. Caseer*, 399 F.3d 828, 840

(6th Cir. 2005); *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010); *United States v. Wright*, 835 F.2d 1245, 1249 n.1 (8th Cir. 1987); *United States v. Lovern*, 590 F.3d 1095, 1107, 1109 (10th Cir. 2009); *Cosby v. Jones*, 682 F.2d 1373, 1382–83 (11th Cir. 1982); *Curley v. United States*, 160 F.2d 229, 233 (D.C. Cir. 1947). The Ninth Circuit shares its minority approach with the Third and Fifth Circuits, both of which have rejected the equipoise rule. *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 431–32 (3d Cir. 2013) (en banc); *United States v. Vargas-Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (en banc).

This case thus implicates a clear and outcome-determinative split over the equipoise rule. The Court should grant review to resolve that split.

B. The Issue Presented Is Important Because the Decision Below Would Allow Widespread Convictions for Innocent Conduct

The Ninth Circuit's decision is not simply a one-off mistake, bad for Henning but not anyone else. Allowing the Ninth Circuit's analysis to stand would in turn allow convictions to stand based on little more than where defendants were and what company they kept.

That is particularly problematic given how "the reach of federal criminal law has expanded" in recent years. *Kansas v. Garcia*, 140 S. Ct. 791, 806 (2020). By one estimate, the U.S. Code now "contains more than 4,500 criminal statutes, not even counting the hundreds of thousands of federal regulations that can trigger criminal penalties." *Gamble v. United States*, 139 S. Ct. 1960, 2008 (2019) (Gorsuch, J., dissenting); *see Yates v. United States*, 574 U.S. 528, 569–70 (2015)

(Kagan, J., dissenting) (calling the tendency toward "overcriminalization and excessive punishment" a "pathology in the federal criminal code"). As a result, there is probably "no one in the United States over the age of 18 who cannot be indicted for some federal crime." *Gamble*, 139 S. Ct. at 2008 (Gorsuch, J., dissenting) (internal quotation marks omitted).

Because courts "do[] not get to rewrite the law," *Yates*, 574 U.S. at 570 (Kagan, J., dissenting), they can't cure this expansion. But they shouldn't make it worse. That is precisely what the Ninth Circuit did, by expanding the universe beyond the individuals who actually participated in the crime to include anyone who knew about it and was somewhere nearby.

Take for example, criminal copyright infringement (17 U.S.C. § 506): If a digital pirate uploads a hit song on a file-sharing website, the Ninth Circuit could uphold a conviction of the pirate's roommate if the roommate knew about it. Or, as here, courts would affirm the convictions of anyone who knew about a Hobbs Act robbery before it was committed and who was then found near the crime scene, even if, as was the case with Henning, there is no evidence they did anything to assist the robbery.

By not giving putative offenders notice of "what the law demands," expansive criminal liability "invite[s] the exercise of arbitrary power" by "allowing prosecutors and courts to make it up." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223–24 (2018) (Gorsuch, J., concurring). That is why this Court has repeatedly rejected analyses of criminal statutes that would "criminalize a broad range of day-to-day activity." *United States v. Kozminski*, 487 U.S. 931, 949 (1988);

see also Marinello v. United States, 138 S. Ct. 1101, 1109 (2018); *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016); *Yates*, 574 U.S. at 547–48. This Court should do the same with analyses of criminal convictions that would uphold convictions based on mere presence.

CONCLUSION

The Court should summarily reverse the Ninth Circuit's judgment or, in the alternative, grant the petition.

Respectfully submitted,

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July 2, 2020