No.

IN THE

SUPREME COURT OF THE UNITED STATES

DEANDRE MCINTOSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant can be convicted of drug conspiracy when he was no more than a buyer seller and the government failed to establish he had knowledge of and a stake in the conspiracy?

RELATED PROCEEDINGS

United States District Court

United States v. McIntosh, et al., CR-19-428-RGK (C. D. Cal.)

Ninth Circuit Court of Appeals

United States v. McIntosh, Ninth Circuit No. 21-50044

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Petitioner Deandre McIntosh respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on March 22, 2022. The decision is unpublished.

OPINION BELOW

On March 22, 2022, the Court of Appeals entered its decision the affirming drug conspiracy conviction. (Appendix A [memorandum].) The petition for rehearing was denied on April 7, 2022. (Appendix B.)

JURISDICTION

On March 22, 2022, the Court of Appeals affirmed Petitioner's conviction. (Appendix A.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on July 6, 2022. Supreme Court Rule 13. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment (partial)

"No person shall be deprived of ... liberty ... without due process of law"

STATEMENT OF THE CASE

Petitioner is serving a life sentence at the Centinela State Prison in Imperial, California. In the past he has been disciplined by the prison for possession of cellphones and marijuana use.

Lamont Devault, another prisoner serving a life sentence, arranged for Lance Medina, a civilian employee who worked as a prison cook, to smuggle cellphones, tobacco, and drugs into the prison. Medina was provided this contraband by Devault's son, Lamont Devault II, who lived in Los Angeles.

Petitioner was charged only with conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846. The codefendants were charged with conspiracy and also with possession with intent to distribute both methamphetamine and heroin in violation of § 841(a)(1).

The government's case against Petitioner relied on narcotics to be smuggled into the prison by Medina between November 10 and 11, 2017. The deal was negotiated on October 23, five days before there was any communication between Devault and McIntosh by text message.

- On October 28, 2017, McIntosh sent a text to Devault that said: "I want 3 green 2 black 1 white and 1k8. That's 12900 I got u all on hand. And I get a pouch of bugler free right." (Exhibit 22, ER-14.) The government conceded that "nothing in the evidence actually says what white is." (2/5/20 RT 133, 3-DER-389.)

- On October 30, 2017, McIntosh spoke to Devault about the purchase of chargers and cellphones. Devault asked McIntosh "how many phones can you buy at one time" and McIntosh responded, "I gotta see what the demand is probably like eight." Devault told McIntosh to "deposit the money" for "the phones." (Exhibits 23 and 24 [Excerpt of Call No. 1489, Clip I], ER-15-16.)

- On November 10, 2017, Devault told McIntosh that he had "white" and McIntosh said he wanted fifteen. Devault said he only had one, which McIntosh wanted. Devault did not have any black. (Exhibit 26 [Excerpt of Call No. 3029], ER-17.) On this date, Medina smuggled drugs into Centinela. (2-DER-196-197, 211-212, 279.)

- On November 11, 2017, Devault told McIntosh he was waiting for some black to be dropped off. (Exhibit 28 Excerpt of Call. No. 3193], ER-19.) On this date, Medina was arrested at his home. He had a bundle of drugs on his person. He initially denied guilt, but ultimately confessed. (2-DER-280-281.)

- After Medina was arrested, Devault called McIntosh and said "that was an ounce of heroin that the boy had I thought it was an ounce of white I gave him an ounce I gave Umar an ounce of heroin ... it wasn't the white it was the black" and "Imma have to change my number too cuz uh theres some shit going on over here ... they cracked the mothafucka so you know" and "when they crack the police how long do it take for them to start hitting cells." (Exhibit 31, ER-20.) McIntosh replied "about 4-5 days." (*Id*.)

- On November 13, 2017, McIntosh texted Devault "Cuz I'm do 1250 n 1250 to different accounts, to which Devault texted back, "Cool." (Defense Exhibit 202, ER-24.)

At trial, Petitioner's defense was that he was a drug addict who was obtaining drugs to support his habit. He was no more than a buyer seller. He also wanted cellphones. Neither Medina nor Devault II had any dealings with Petitioner. Medina testified that he asked Devault who else was "in it" and Devault "mentioned a guy named McIntosh." (2-DER_274.) Medina had never heard of McIntosh.

The court instructed the jury, *inter alia*, that:

> one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists."

(CR 167 at 15, 16 [Jury Instruction No. 14] ER-29; 3-DER-435.)

> A buyer-seller relationship between a defendant and another person, standing alone, cannot support a conviction for conspiracy. The fact that a defendant may have bought controlled substances from another person or sold controlled substances to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy. Instead, a conviction for conspiracy requires proof of an agreement to commit a crime beyond that of the mere sale.

(CR 167 at 19 [Jury Instruction No. 17] ER-31; 3-DER-438.)

Petitioner was convicted of conspiracy and sentenced to 92 months consecutive to his life sentence. Devault was also convicted as charged and sentenced to 188 months consecutive to his life sentence.

On appeal, Petitioner argued that the evidence he was involved in the conspiracy between Devault and Medina was insufficient. Viewing the evidence in the light most favorable to the prosecution, the evidence that McIntosh was in agreement with Devault and Medina to smuggle drugs was pure speculation. The text message (Exhibit 22, ER-14) and recorded calls are about cellphones not drugs. (Exhibits 24, 26, 28, 31, ER-16-20.) To the extent that any call references drugs (e.g. heroin) this was *after* Medina had already been arrested. (Exhibit 31, ER-20.) Even if McIntosh sought to buy drugs, he was no more than a buyer, which could not support a conviction for conspiracy.

The Ninth Circuit rejected Petitioner's claim of insufficient evidence as to the conspiracy conviction because: (1) the government presented intercepted phone calls and text messages in which McIntosh and Devault used the words "black" and "heroin" interchangeably and McIntosh agreed to purchase $2500 of "black," an amount inconsistent with personal use; (2) McIntosh said he got "little pay" for reselling the drugs; and (3) Medina testified that Devault told him McIntosh was involved in helping to re-sell the drugs within the prison. (Appendix A at 2-3.)

REASONS FOR GRANTING THE WRIT

THE EVIDENCE OF DRUG CONSPIRACY IS INSUFFICIENT UNDER THE BUYER SELLER RULE

This case is an excellent vehicle to clarify the rules for sufficiency of evidence as to conspiracy and the buyer seller rule. It is well settled that when reviewing the sufficiency of evidence to support a criminal conviction, "the relevant question 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*, 443 U.S. 307, 319 (1979). See also *McDaniel v. Brown*, 558 U.S. 120, 132 (2010) (reaffirming this standard).

A reviewing court must presume that the trier of fact resolved any conflicts in the evidence in favor of the prosecution and must defer to that resolution. *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) citing *Jackson*, 443 U.S. at 326. After reviewing all the evidence in the favor of the government:

> the evidence may still be so supportive of innocence that no rational juror could conclude that the government proved its case beyond a reasonable doubt. Moreover, the evidence construed in favor of the government may be insufficient to establish every element of the crime.

Nevils, 598 F.3d at 1167.

Evidence is insufficient "where mere speculation, rather than reasonable inference, supports the government's case," *Nevils*, 598 F.3d at 1167, citing *Juan H. v. Allen*, 408 F.3d 1262, 1277-79 (9th Cir. 2005), "or where there is a 'total failure of proof of a requisite element," citing *Briceno v. Scribner*, 555 F.3d 1069, 1079 (9th Cir. 2009).

To establish a drug conspiracy the government must prove an agreement to accomplish an illegal objective and an intent to commit the underlying offense. *Loveland*, 825 F.3d at 559; United *States v. Navarrette-Aguilar*, 813 F.3d 785, 794 (9th Cir. 2015). The government can prove a conspiracy by circumstantial evidence and an express agreement is not required. *Ibid*.

> To convict [a defendant] of a narcotics conspiracy, the government was required to show: (1) there existed an agreement between two or more persons to possess with intent to distribute or to distribute [a controlled substance]; and (2) [the defendant] joined the agreement knowing of its purpose and intending to help accomplish that purpose.

United States v. Perez, 962 F.3d 420, 444 (9th Cir. 2020).

"Once a conspiracy a conspiracy exists, evidence establishing beyond a reasonable doubt defendant's connection with the conspiracy, even though the connection is slight, is sufficient to convict defendant of knowing participation in the conspiracy." *United States v. Penagos*, 823 F.2d 346, 348

(9th Cir. 1987). Nevertheless, "evidence has to be produced to show that" the defendant "had knowledge of the conspiracy and acted in furtherance of it. Mere casual association with conspiring people is not enough." *United States v. Cloughessy*, 572 F.2d 190, 191 (9th Cir. 1977). See also, *United States v. Espinoza-Valdez*, 889 F.3d 654, 656-57 (9t Cir. 2018) ("Mere association and activity with a conspirator does not meet the test."); *United States v. Lennick*, 18 F.3d 814, 818 (9th Cir.1994) ("knowledge, approval of, or acquiescence in the object or purpose of a conspiracy, without an intention and agreement to accomplish a specific objective, is not sufficient" to prove drug conspiracy).

In *United States v. Mendoza*, 25 F.4th 730, 738 (9th Cir. 2022), the court clarified that to be convicted of conspiracy, the government must prove the defendant's "knowledge of" and "shared stake" in the conspiracy. In *Mendoza*, the court reversed a drug addict gang member's conspiracy conviction because the government did not establish the "prolonged and actively pursued course of [drug] sales' for which we look when deciding, if there is 'sufficient evidence of an agreement.'" *Id.* Further, as noted above, under the buyer seller rule simply buying drugs and then selling them does not make one a conspirator.

Because of the frequency with which drug conspiracy charges are brought against a wide array of defendants it is important to clarify the buyer seller rule vis-a-vis conspiracy.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: June 22, 2022 Respectfully submitted,

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