

JUN 10 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE PILAR NORIEGA-ENCINAS,  
AKA Jose Pilar Noriega-Encinas AKA  
Jose Noriega-Encinas,

Defendant - Appellant.

No. 08-10284

D.C. No. 2:06-cr-01006-CKJ-  
CRP-1

MEMORANDUM\*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE PILAR NORIEGA-ENCINAS,

Defendant - Appellant.

No. 08-10292

D.C. No. 4:02-CR-01640-CKJ-  
CRP

Appeals from the United States District Court  
for the District of Arizona  
Cindy K. Jorgenson, District Judge, Presiding

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted June 8, 2009  
San Francisco, California

Before: SCHROEDER, TASHIMA, and BEA, Circuit Judges.

Jose Noriega-Encinas, a native and citizen of Mexico, appeals his conviction for illegal re-entry into the United States after deportation, in violation of 18 U.S.C. § 1326, on the ground the district court erred by finding him competent to stand trial.

First, the district court did not commit plain error by failing sua sponte to order an additional competency hearing the week before trial, because three other competency hearings in the previous ten years, including one six months before trial, had determined Noriega-Encinas was competent to stand trial and that he might have been malingering. *See Odle v. Woodford*, 238 F.3d 1084, 1087 (9th Cir. 2001) (holding a competency hearing is necessary only if a reasonable judge would have a “bona fide” doubt about the defendant’s competence).

Second, the district court’s query whether Noriega-Encinas wished to proffer evidence or make a statement regarding his competency did not “shift” the burden of proof. It was an enquiry as to whether Noriega-Encinas wished to present evidence. Further, even if it had done so, the Supreme Court has held the allocation of the burden of proof “will affect competency determinations only in a

narrow class of cases where the evidence is in equipoise.” *Cf. Medina v. California*, 505 U.S. 437, 449 (1992). The number of evaluations that concluded Noriega-Encinas was competent to stand trial (compared to the absence of any finding him incompetent) rendered the evidence far from “in equipoise.”

Finally, the district court did not commit clear error by finding Noriega-Encinas competent. *See United States v. Friedman*, 366 F.3d 975, 980 (9th Cir. 2004). Several competency evaluations concluded he was competent, he presented himself lucidly and clearly during trial, and there was no evidence that Noriega-Encinas was unable to assist his counsel in preparing for or during trial.

**AFFIRMED.**