No: _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2018

JUAN FLORES, a/k/a ALEJANDRO BECERRA

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

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

COUNSEL OF RECORD:

MURRAY W. BELL, P.C.
2435 Kimberly Road
Suit 235 South
Davenport, Iowa 52803
563-326-4095

I

QUESTION PRESENTED FOR REVIEW

Whether the District Court and Eighth Circuit Court of Appeals erred when it ruled that a statement made during a casual conversation between co-conspirators for the purpose of passing time while they are driving from one location to another during which one co-conspirator tells another co-conspirator some minimal information about a precious co-conspirator the statement is admissible under Federal Rule of Evidence (FRE) 801(d)(2)(E) as being made "during and in furtherance of the conspiracy" when there is no suggestion any action should be taken based upon the statement or that the information should be used for any particular purpose or in any particular way.

II

List of Parties

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

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No: _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

JUAN FLORES, a/k/a ALEJANDRO BECERRA,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

Petitioner, **JUAN FLORES, a/k/a ALEJANDRO BECERRA**, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit, issued on the 29th day of May 2018 affirming the Petitioner's conviction and sentence.

V

OPINION BELOW

The of the Eighth Circuit Court of Appeals affirming the rulings of the District Court may be found at United States v. Perez-Travino, 891 F.3d 359 (8th Cir., 2018), and appears in Appendix A to this Petition.

VI

JURISDICTION

On May 29, 2018, the Eighth Circuit Court of Appeals issued an Order affirming the judgment of the District Court entered on February 3, 2017.

This petition is timely filed pursuant to Supreme Court Rule 13.3 in that it is being filed within ninety (90) days of the Circuit Court's final order.

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

VII

STATEMENT OF THE CASE

On the 26th day of August, 2015, the Grand Jury returned an Indictment in case number 6:15-cr-2037, charging Defendant-Appellant, Juan Flores along with 10 other defendants with Conspiracy to Distribute a mixture and substance containing a detectable amount of methamphetamine, and in the case of Mr. Flores, a mixture and substance containing a detectable amount of methamphetamine

specifying no quantity of methamphetamine, in violation of Title 21, U.S.C., Section 841(a)(1). Mr. Flores made his initial appearance in United State District Court for the Northern District of Iowa on the 26th day of January, 2016. A Detention hearing was held on the 1st day of February, 2015. At the Conclusion of the hearing the Court Granted the Government's motion for detention.

The case proceeded to trial along with co-defendants Marcos Perez-Trevino and Daniella Costellanos. Trial commenced with jury selection on the 5th day of August, 2016 and continued on the 9th, through the 12th, and15th days of August, 2016. The Defendant was found guilty on the relevant count. The judgement and sentence was filed on the 3rd day of February 2017.

VIII

REASONS FOR GRANTING THE WRIT

At the trial for Mr. Flores and his co-defendants, the Government presented Mr. Avalos-Sanchez as a witness. He testified that sometime near the end of 2014, a cousin of his named of Murillo-Mora gave him some financial help by giving him some work of driving Murillo-Mora around in exchange for cash. (Tr. Tr. Vol. II, p. 445, ll. 10 - 22.) He further testified that though his work with Murillo-Mara he became familiar with Mr. Flores.

Over Defendant Flores's hearsay objection, the Court allowed Mr. Avalos-

Sanchez to testify about conversations between Mr. Avalos-Sanchez that took place while Avalos-Sanchez was a chauffeuring Mr. Murillo-Mora concerning events that had taken place in the past. The Statements appeared to have no relevance to Murillo-Mora's ongoing conspiracy. Mr. Avalos-Sanchez was allowed to testify that:

> Just that [Mr. Flores] was driving [Murillo-Mora] around practically. And at one point in time, they stopped like being friends or [Murillo-Mora] cut [Mr. Flores] off or something like that. And that's when -- later on, he told me that he cut him off because they weren't, like, agreeing to things or stuff, weren't agreeing to nothing, you know what I mean, like business or anything. [Mr. Flores] wanted to go his way and Mario [Murillo-Mora] wanted to go his own way.

(Tr. Tr. Vol. II, p. 447, ll. 9 - 18.) The prosecution went on to suggest that the "business" was "distributing meth." (Tr. Tr. Vol. II, p. 448, ll. 5 - 14.)

The Government called Rogelio Avalos-Sanchez, to testify about his working for Mr. Murilla-Mora. The part of Mr. Avalos-Sanchez's testimony that lead up to the defendant's hearsay objection was as follows:

Q. [By A.U.S.A. Williams] Did there come a time when you approached Mr. Murillo-Mora about helping him sell methamphetamine?
A. Yes, when I was needing some financial help, I came to him asking him for some help and he offered me some help.
Q. Do you remember what time frame, month and year maybe that was?
A. End of 2014.
Q. And did he agree -- did he give you some work to do?
A. Just drive around for him.
Q. What types of -- or what places were you driving for him?
A. Waterloo and around Marshalltown, and all over the place.
Q. What did you get in exchange?

A. Cash.
Q. And through your work with Mr. Murillo-Mora, did you become familiar with an individual named Juan Flores?
A. At one point in time.
Q. Is that a yes?
A. Yes.
Q. Do you see Mr. Flores in the courtroom today?
A. Yes.
Q. Can you describe where he's sitting and an item of clothing that he's wearing?
A. He's on my left, with a gray shirt.
MS. WILLIAMS: Your Honor, may the record reflect that the witness has identified the defendant?
THE COURT: Yes.
Q. Through speaking with Mario Murillo-Mora, did you learn from Mr. Murillo-Mora what Mr. Flores's involvement was in the Murillo organization?
A. Some. Some parts.
Q. Some parts?
A. Yeah.
Q. Tell the jury what Mr. Murillo-Mora told you.
MR. BELL: Objection, hearsay.

(Tr. Tr. p. Vol. II, 445, l. 13 to p. 446, l. 24.)

The Government then asserted that the statement the Government was offering was not hearsay and "the Bell procedures apply." (Tr. Tr. Vol. II, p. 446, l, 24 to P. 447, l. 6.) See United States v. Bell, 573 F.2d 1040 (8th Cir., 1978.)

On Cross examination by this Counsel for Mr. Flores the testimony went as follows:

Q. Now, during that period of time that you were driving for Mr. Murillo-Mora -- well, at what point in time did Mr. Murillo-Mora tell you information that you had testified about yesterday about Juan Becerra?
A. We would talk almost every day, so he would tell me mostly parts of what he was doing and everything.
Q. Okay. But --
A. He would tell me --

Q. He was telling you that after you were driving for him, right?
A. Yeah.
Q. And Juan was no longer driving for him?
A. No.
Q. And he didn't ask you to do anything about the fact that this -- what he claimed about Juan?

MS. WILLIAMS: Objection, hearsay.

THE COURT: Do you agree it's hearsay? And if it is hearsay, does an exception apply?

MR. BELL: I don't believe it's hearsay. I think it's a verbal act when you ask a question.

THE COURT: Objection's overruled. The witness may answer.

Q. (By Mr. Bell) Did he ask you to do anything about the fact that -- what he claimed about Juan?
A. No.
Q. He was just giving you information?
A. Yeah.
Q. Didn't ask you to follow through or do something about it?
A. No.
Q. You can't tell me at what time period in that four-month period that you worked for Mr. Murillo-Mora that those conversations took place? As I understand it, you're saying it was a piece here, a piece there, like that?
A. Right.
Q. It would be something you would just talk about when you were together and there was nothing else to talk about?
A. Right.
Q. And it was probably a time consumer while you were driving him maybe to Omaha or wherever?
A. Right.

(TR. TR. Vol. III, p. 482, l. 24 to Vol. III, p. 484, l. 16.)

After all the testimony had been offered in the trial, the Court addressed the Mr. Flore's objection under the Bell Procedures. In support of the Government's assertion that the statement was admissible, the Government argued;

MS. WILLIAMS: Thank you, Your Honor.

> Again, Mr. Avalos-Sanchez discussed his role, not as a hub or a spoke but as a facilitator of a spoke and -- of Mr. Murillo's spoke. And during that, when Mr. Murillo tells him, "Here are the people I used to work with but I don't work with them anymore," those statements are in furtherance of the conspiracy because he's now advising the guy that's doing a lot of work for him not to deal with other people. You know, we used to work together, not anymore, we had a falling out, so, you know, just want to -- it's like apprising him of a development in the conspiracy, and that's how that statement is in furtherance.

(Tr. Tr. Vol. IV p. 823, l. 1 to Vol. IV, p. 825, l. 2.) This argument is contrary to the evidence adduced on the cross examination of Mr. Avalos-Sanchez. Mr. Avalos-Sanchez testified they would talk about it because they didn't have anything else to talk about. Furthermore, Avalos-Sanchez stated that he was never asked to follow up on the information or do anything about or with the information. It appears to have been nothing more than conversation to fill the time as Avalos-Sanchez was driving Murillo-Mora around. Furthermore there was no testimony that Murillo-Mora instructed Mr. Avalos-Sanchez "not to deal with other people" as asserted by A.U.S.A. Williams in her argument to the Court. (Tr. Tr. Vol. IV p. 824, ll. 22 - 23.)

IX

THE LAW AND ANALYSIS

The Defendant asserts the statements at issue were not made in furtherance of the conspiracy and therefore were improperly admitted into evidence. This Court has held that Rule 801(d)(2)(E) provides that a statement is not hearsay if it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." The Eighth Circuit has held that for a statement to be admissible, the government must prove (1) that a conspiracy existed, (2) that the defendant and the declarant were members of the conspiracy, and (3) that the statements were made in furtherance of the conspiracy. *United States v. DeLuna*, 763 F.2d 897, 908 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985) (citing *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir.1978)). "In order to be made in furtherance of the conspiracy, a statement 'must somehow advance the objectives of the conspiracy, not merely inform the listener [or reader] of the declarant's activities.' *United States v. Snider*, 720 F.2d 985, 992 (8th Cir.1983) (citations omitted) (emphasis added), cert. denied, 465 U.S. 1107, 104 S.Ct. 1613, 80 L.Ed.2d 142 (1984)." *United States v. DeLuna*, 763 F.2d 897, 909 (8th Cir. 1985) overruling on other grounds recognized by *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986).

In *United States v. Snider* the Eighth Circuit dealt with the question of what constitutes statements "in the furtherance" of a conspiracy. *United States v. Snider*, 720 F.2d @ 992. In the District Court a female witness testified that she went with a

codefendant named Yost to the 330-acre farm a number of times and met Snider there. She testified on two occasions after she arrived on the farm, Yost gave her a tour of the farm and described the operation. During the course of a six week stay at the farm, Yost commented to her about the participation of people she met there. She further testified that the first and last time she visited the fields was when the Yost gave her a tour of the farm. The *Snider* Court discussed statements made by a co-conspirator that could be construed as intended to impress a female friend. The Court pointed out that ". . . nothing in the record suggests that [the co-conspirator's] descriptions to [the female] of the operation, and the duties of the participants, in any way furthered the objectives of the conspiracy."*United States v. Snider, 720 F.2d 985, 992 (8th Cir. 1983.)* The Court then favorably cited the case of *United States v. Eubanks*, 591 F.2d 513 (9th Cir., 1979) for the proposition that " '[m]ere conversation[s] between conspirators' or 'merely narrative declarations' are not admissible as declarations in furtherance of the conspiracy." *United States v. James*, 510 F.2d 546, 549 (5th Cir. 1975); *See also United States v. Birnbaum*, 337 F.2d 490, 495 (2d Cir. 1964) and *United States v. Goodman*, 129 F.2d 1009, 1013 (2d Cir. 1942). For declarations to be admissible under the co-conspirator exception, they must further the common objectives of the conspiracy." *United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979.)* In Mr. Flores's case, Mr. Avalos-Sanchez made clear that the information he received concerning Mr. Flores was just idle talk. He was not asked to doing anything with the information or to follow up on the information. He was not instructed to "not deal" with Mr. Flores. Therefore

the statements were "[m]ere conversation[s] between conspirators" and "merely narrative declarations" made to take up the time while they were traveling and they had nothing else to talk about. Based upon the law set out in *United States v. Snider*, 720 F.2d 985, 992 (8th Cir.1983), *United States v. Eubanks*, 591 F.2d 513 (9th Cir., 1979) and the cases it relied upon, this Court should find that the statements made by Murillo-Mora to Mr. Avalos-Sanchez concerning Mr. Flores were not in the furtherance of the conspiracy, were improperly admitted at the trial and the admission of the statements constituted abuse of discretion by the trial Court. In *United States v. Green*, 600 F.2d 154 (8th Cir., 1079) in an appeal of a conviction for conspiracy to possess checks stolen from the mail, the Eight Circuit addressed a hearsay objection to the following testimony:

Q. (By Assistant United States Attorney) "Miss Johnson, going back to the conversation that you had with Donnie Patterson in the car while Lucille and Richard were in the store cashing the check. Now, you did have a conversation with Donnie Patterson then?

A. Yes.

Q. And was that about the checks?

A. Yes.

Q. What did Donnie Patterson say about the checks?

A. Well, I asked him how did they get the checks and he said that Richard took them out from the mailbox, and he said he was watching out for them while he took them? (Sic.)

Q. That Donnie was watching out for them?

A. Yes.

United States v. Green, 600 F.2d 154, 157 (8th Cir. 1979). The defendants argued

this statement was not made in furtherance of the conspiracy. The Court ruled on the statements as follow:

> The statements made by Donald Patterson to Loretta Johnson appear to have been casual comments which were neither intended to further nor had the effect of furthering the conspiracy in any way. The statements were not "in furtherance" of the conspiracy and therefore did not qualify for admission under Fed.R.Evid. 801(d)(2)(E).

United States v. Green, 600 F.2d at 158.

The Sixth Circuit Court of Appeals in addressing the issue of whether a statement was "in furtherance of the conspiracy" in the case of *United States v. Warman*, 578 F. 3d 320 (6th Cir. 2009) engaged in a significant analysis of the issue. There the *Warman* Court wrote that "mere idle chatter or casual conversation about past events is not considered a statement in furtherance of the conspiracy." *Id* @ 338. The Court also wrote that "A statement is 'in furtherance of' a conspiracy if it is intended to promote the 'objectives of the conspiracy.' " *United States v. Warman*, 578 F.3d 320, 338 (6th Cir. 2009).

A review of the challenged testimony in the Flores case shows that it was nothing more than idle chat for the purpose of avoiding boredom and consuming time as the declarant and his driver were traveling from city to city. Furthermore, there is nothing in the content of the conversation suggesting it was intended to further the conspiracy. There was no instruction to follow up on the information or do anything with the information. The United States attorney attempted make it appear as if the statement was in furtherance of the conspiracy by making the claim,

unsupported by the testimony, that the declarant was telling his driver Flores is no longer in the conspiracy so don't deal with him. But there was no testimony to support that claim.

The Fifth Circuit Court of Appeals addressed a similar issues concerning one conspirator describing and event that took place in the past. *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981). There the Court ruled that a statement describing the past event "was a retrospective statement" and not intended in any way to advance the conspiracy. *Id*. at 1027

X

CONCLUSION

For all the reasons set forth about it is clear the District Court erred when found that the statements at issue were made in furtherance of the conspiracy and the Eighth Circuit court of Appeals erred when affirmed the District Court's ruling on the issue. Consequently this Court should remand this case for a new trial.

Juan Flores, a/k/a Alejandro Becerra

By: /s/ Murray W. Bell

Murray W. Bell, P.C , Iowa No. 9596
2435 Kimberly Road, Suite 235 South
Bettendorf, IA 52722
Phone No.: 563-326-4095
Facsimile: 563-594-5180
E-mail: mwbell@kirkwoodlaw.com