

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOEL CUEVAS – PETITIONER

v.

UNITED STATES OF AMERICA – RESPONDENT

PETITION FOR WRIT OF CERTIORARI

FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. The Government provided an insufficient factual basis to support Mr. Cuevas' guilty plea to a conspiracy, because there is no showing that at the time Mr. Cuevas entered into an agreement with his sister Mr. Cuevas had the intent to commit a crime.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Joel Cuevas, Defendant-Appellant.
2. United States of America, Plaintiff-Appellee.
3. Counsel for Plaintiff-Appellee:
United States Attorney Kenneth Magidson; and Assistant United States Attorneys Amanda Lee Gould (in district court), and Julie Margaret Redlinger (on appeal).
4. Counsel for Defendant-Appellant:
Armando Cavada and Micah Wayne Hatley (in district court), and Ed Stapleton (on appeal).

TABLE OF CONTENTS

Contents	Page
QUESTIONS PRESENTED.....	2
LIST OF PARTIES	3
OPINIONS BELOW	6
JUISDICTION	6
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	6
STATEMENT OF THE CASE.....	7
REASONS FOR GRANTING THE PETITION	11
CONCLUSION.....	11

INDEX TO APPENDICES

Decision of U.S. Court of Appeals for the 5 th Circuit	APPENDIX A
Decision of U.S. District Court for Southern District of Texas	APPENDIX B
Decision of U.S. Court of Appeals for the 5 th Circuit Denying Rehearing.....	APPENDIX C

TABLE OF AUTHORITIES CITED

Cases

<i>United States v. Bishop</i> , 603 F.3d 279, 280 (5th Cir.2010)	13
<i>United States v. Frady</i> , 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)..	14
<i>United States v. Hope</i> , 545 F.3d 293, 296 (5th Cir.2008)	14
<i>United States v. Jackson</i> , 549 F.3d 963, 977 (5th Cir.2008)	14
<i>United States v. Olano</i> , 507 U.S. at 734, 113 S.Ct. 1770	13
<i>United States v. Trejo</i> , 610 F3d 808 (5 th Cir. 2010)	12

Statutes

8 U.S.C. Sec. 1324 (a)(l)(A)(v)(II)	7
8 U.S.C. Sec. 1324(a)(l)(B)(ii)	7
18 U.S.C. Sec. 3553.....	7
21 U.S.C, Sec. 846, 841(a)(1) and 841 (b)(1)(A)	7
28 U.S.C. Sec. 1254(1).....	7

Constitutional Provisions

5 th Amendment	6
6 th Amendment	6

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to this petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to this petition and is unpublished.

JUISDICTION

The date on which the United States Court of Appeals decided Mr. Cuevas case was February 15, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date March 26, 2018, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves issues pursuant to 5th Amendment, 6th Amendment and 18 U.S.C. 3559.

STATEMENT OF THE CASE

A. The offenses and plea.

Mr. Cuevas, a citizen of the United States, was charged on June 6, 2016 by the Federal Grand Jury in Corpus Christi, Texas. Mr. Cuevas was charged with the following:

COUNT 1: Did knowingly and intentionally conspire to transport undocumented aliens within the United States. In violation of Title 8, USC, Sec. 1324(a)(1)(A)(ii), 1324 (b)(1)(A)(v)(I), and 1324 (a)(1)(B)(i).

COUNT 2: Did knowingly and in reckless disregard bring in and harbor alien. In violation of Title 8, USC, Sec. 1324(a)(1)(A)(ii), 1324 (a)(1)(A)(v)(II) and 1324(a)(1)(B)(ii).

On June 27, 2017, 2016 Mr. Cuevas entered his plea of not guilty. On July 20, 2016, Mr. Cuevas was re-arraigned before United States District Judge Hayden Head and plead guilty to count 1.

B. Statement of the Facts.

Mr. Cuevas was charged in a two count indictment with conspiracy to transport aliens and transporting aliens. The trial court issued a Standing Order on Rule 11 Procedures requiring that the guilty plea be supported by facts agreed upon by the parties.

Mr. Cuevas entered into a stipulation with the government under Rule 11 stating in pertinent part:

a. Paragraph 4: “That Joel Cuevas conspired and agreed with San Juanita Davila and others to violate the laws of the United States by transporting, moving attempting to move aliens within the United States in furtherance of the aliens' presence.”

b. Paragraph 5 (in part): “Cuevas later gave a statement during which he told agents that his sister, San Juanita Davila, had asked to borrow his car the day before to pick up her boyfriend. He lent her his vehicle, and she later returned to Cuevas's house to ask of Cuevas could help her cross her boyfriend through the Falfurrias checkpoint. Cuevas denied that he was going to receive payment for his role in the conspiracy.”

At re-arraignment Mr. Cuevas balked at entering the plea and the defense attorney asked for a continuance so he could file a Motion to Withdraw: “Your Honor, he wants to plead guilty but does not agree with the stipulation, which would make him not guilty.” The judge refused to take the plea at that time “I'm not accepting your plea of guilty. How about that? Now, you're going to trial. The reason I'm not accepting your plea of guilty is because, apparently, he doesn't want to admit to the elements of the offense, which is fine.” He further referred to the facts that were unclear: “I don't know what your sister told you. I wasn't there.”

After a recess, Mr. Cuevas returned and again said he wanted to plead guilty.

The trial judge discussed the conspiracy elements with Mr. Cuevas:

THE COURT: “So the Government would have to prove that on June the 6th of this year that you and San Juanita Davila and others know and unknown to the grand jury had an agreement among yourself to violate the law by transporting illegal aliens. And the Government would have to prove that you learned of that agreement, made yourself a part of it freely and voluntarily with specific intent to violate the law by transporting persons or persons who need to be illegally within the United States.

Do you understand that?

DEFENDANT CUEVAS: Yes, sir.

THE COURT: Do you believe you did that?

DEFENDANT CUEVAS: Yes, sir.” ROA. 78.

Mr. Cuevas said he was pleading guilty, “Because I committed the crime, and I'm guilty, sir.” Based on these statements, the trial court found Mr. Cuevas understood the charge and accepted the plea. The Government then offered the same stipulation of facts to support the plea that Mr. Cuevas had earlier disavowed. The trial court asked, “Did these things happen.” And this time, Mr. Cuevas said, “Yes, sir.”

The discussion continues:

“THE COURT: And did you agree with San Juanita Davila to transport an illegal alien through the Falfurrias checkpoint?

DEFENDANT CUEVAS: Yes, sir.

THE COURT: Why did you make that agreement?

DEFENDANT CUEVAS: Was – I mean, I never thought about it right, and I just – she needed the help and money for to fix her car, and I just gave in. And I know I should have known, because it’s wrong for me to do that.

THE COURT: Did you know that the person that you were going to transport was illegally within the United States?

DEFENDANT CUEVAS: Yes, sir.

THE COURT: And I guess that person ended up in your car somehow?

DEFENDANT CUEVAS: Yes, sir.”

Sentencing discussions surrounding Mr. Cuevas' decision to help his sister are as follows:

THE COURT: Then, why didn’t you just tell your sister, no, you weren’t going to help her.

DEFENDANT CUEVAS: Well, she’s a single mom, sir, and no pay – I mean, nobody would help her out.

THE COURT: Then, why didn't you tell her, no, that you weren't smuggle this alien?

DEFENDANT CUEVAS: Because she's a single mother, and she didn't have help from nobody, and she came to me. And I know it was a wrong mistake to do it.

Sentencing

On October 4, 2016, Mr. Cuevas was sentenced to 15 months in custody of BOP, followed by 3 years SRT.

C. Appeal

Mr. Cuevas timely filed his appeal to the United States Court of Appeals for the Fifth Circuit and affirmed the District Courts judgment.

REASONS FOR GRANTING THE PETITION

The decision affirming Mr. Cuevas' conviction relies on *United States v. Trejo*, 610 F3d 808 (5th Cir. 2010) to reach the conclusion that adequate facts were given during the hearing of the plea of guilty to support the plea under the plain error standard. Decision pp. 2-3. This Court says, "...the evidence unquestionably showed that Cuevas entered into an agreement to violate the law and that he...intend to join...the conspiracy." *Id.* at 2.

Applying the standards of *Trejo*, the facts stipulated by Mr. Cuevas are insufficient to show:

1. Mr. Cuevas entered into an agreement to violate the law, or that
2. Mr. Cuevas intended to join a conspiracy.

Trejo provides standards for “intent to promote” a drug trafficking activity by transporting money. *Id.* at 312. This standard is instructive for understanding whether Mr. Cuevas’ fact stipulations were sufficient under Rule 11(b)(3) as a matter of law to establish a violation of the statute, because the facts to support Mr. Cuevas’ conviction include a finding of “intent” in a conspiracy that goes beyond the underlying offense of transporting an undocumented alien. Also, the substantive offense of transporting includes the element of an “agreement” that includes a need for some proof of Mr. Cuevas’ intent.

In comparing the facts of *Trejo* to support the plea, we must keep in mind that, “*Trejo’s* plea does not adequately support his conviction....” *Id.* at 318. Only because the trial judge was considering a “novel” situation, “...not entirely clear under the existing case authority...” did this Court “doom the case for plain error.” *Id.* Differently put, *Trejo* and Cuevas both involved the proof of insufficient facts to support the legal finding of the violation of the statute, but the trial court in Cuevas had the benefit of the clearly established case authority of *United States v. Trejo*.

The elements not proved in Cuevas included whether Mr. Cuevas ever made an agreement with his sister to violate the law and whether he intended to do anything more than help his sister. The trial judge asked for a resolution of these issues, but then accepted the plea without an answer. A review of the requirements of *Trejo* demonstrate the inadequacy of the facts that were used against him and that Mr. Cuevas never admitted or accepted facts that would support the plea.

Trejo acknowledge that proof of intent is “necessarily a fact bound inquiry frequently turning upon circumstantial evidence.” *Id.* at 315. We are then given some types of proof upon which courts have relied. “[T]he defendant was aware of the inner workings of and/or extensively involved in the drug organization responsible for the criminal activity....” *Id.* This was not part of the proof against Mr. Cuevas. The *Trejo* decision also states the cases supporting the finding, “...exemplify the courts' consistent reliance on some additional evidence beyond the bare transaction or transportation itself to infer specific intent.” *Id.* Even though *Trejo*'s car was loaded with drug money, he willingly embarked on a journey with a co-defendant, he initially lied when he was stopped, conceded he was hired by drug dealers known only to them as “Jose” and “Cocho,” and gave vague details about the individuals in Mexico to whom they were delivering the cash, and even though, an IRS/CID described their actions as consistent with the manner in which experienced narcotics traffickers routinely launder drug money, and even though *Trejo* agreed the prosecutor's factual rendition of his criminal conduct was correct, the facts did not suffice to satisfy the specific intent requirement. *Id.* at 317. “Knowing promotion” is not enough, because the proof must rise to the level of “intended purpose.” *Id.*

This Court in *Trejo* then makes a finding that the error is not plain error because it was not error under “current law.” “At a minimum,” establishing plain error requires a showing that the “error [was] clear under current law.” *Olano*, 507 U.S. at 734, 113 S.Ct. 1770; *United States v. Bishop*, 603 F.3d 279, 280 (5th

Cir.2010) (emphasis added). "Current law" is the law in place at the time of trial.¹² *United States v. Jackson*, 549 F.3d 963, 977 (5th Cir.2008). An error is not plain under "current law" "if a defendant's theory requires the extension of precedent." *Id.* (internal citations omitted). Plain error is error so clear or obvious that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Hope*, 545 F.3d 293, 296 (5th Cir.2008) (quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). *Trejo* at 319.

The Court then says, "describing Trejo's claim as "novel" and "not entirely clear under the existing case authority," we doom the case for plain error." *Id.*

The trial court faced clear existing law in this case. *Trejo* was decided 2010 and Mr. Cuevas entered his plea of guilty July 20, 2016. The law had been clear for six years. We urge Mr. Cuevas, like Mr. *Trejo* had insufficient facts to support their plea, but unlike Mr. *Trejo*, the trial judge taking Mr. Cuevas' plea had clear existing case authority.

CONCLUSION

Mr. Cuevas prays this petition for a writ of certiorari should be granted.

Respectfully submitted,

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