

United States Court of Appeals
for the Fifth Circuit

No. 25-40155

United States Court of Appeals
Fifth Circuit

FILED

August 26, 2026

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

JOSE LUIS HERNANDEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:23-CR-426-1

Before RICHMAN, HIGGINSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:*

Jose Luis Hernandez pleaded guilty to a two-count superseding indictment. Count One, as narrowed by the Government's election, charged him with conspiring to receive a firearm knowing or having reasonable cause to believe that the receipt would constitute a felony, in violation of 18 U.S.C. § 933(a)(2) and (a)(3). He did not object to the factual basis for his plea. He now contends, for the first time on appeal, that the factual basis was

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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insufficient. Reviewing for plain error, we conclude that even if the factual basis was deficient, any error was not clear or obvious and AFFIRM. But we REMAND for the limited purpose of correcting a clerical error in the written judgment.

I

In July 2023, agents with the Bureau of Alcohol, Tobacco, Firearms and Explosives were investigating firearm purchases by Hernandez, several of which had been recovered from other persons, including in Mexico. On July 24, 2023, a federally licensed firearms dealer, Diamondback Firearms LLC, alerted the agency to an order for three high-power rifles that Hernandez had placed with another man, S.M. Hernandez had funded the order, paying roughly \$38,500 in cash. Four days later, agents observed Hernandez and S.M. arrive at the dealer together and leave with three cases, which they loaded into a vehicle. After driving away from the premises, local officers stopped the vehicle for a traffic violation. Hernandez was in the front passenger seat, and S.M. was the driver.

ATF agents arrived at the scene of the traffic stop a short time later. Hernandez declined to speak with them and requested an attorney. S.M. agreed to speak with agents after receiving *Miranda*¹ warnings. S.M. stated that Hernandez paid S.M. \$500 to drive Hernandez to Diamondback and for S.M. to fill out the firearm purchase form, ATF Form 4473, for one of the three firearms, a Barrett Firearms Manufacturing Model 82A1 .50 caliber rifle. According to S.M., Hernandez bought and resold firearms but could not purchase additional firearms under his own name. Agents recovered all three rifles and about \$9,000 in cash during the stop.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

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A superseding indictment charged Hernandez in two counts. Count One alleged that he received the rifle from S.M., or attempted or conspired to do so, or aided and abetted its receipt, knowing or having reasonable cause to believe that the receipt would constitute a felony, in violation of 18 U.S.C. §§ 2(a) and 933(a)(2). Count Two alleged that Hernandez aided and abetted S.M. in making a false statement to the dealer in connection with the purchase, in violation of § 922(a)(6).

Hernandez first pleaded guilty to Count Two alone. He then moved to dismiss Count One as duplicitous, and the district court ordered the Government to elect between a theory of attempt and a theory of conspiracy. The Government elected to proceed on conspiracy. Hernandez then pleaded guilty to Count One, and the district court accepted the plea. The court varied downward and imposed concurrent two-year terms of probation and a \$100 special assessment on each count. Hernandez appeals, challenging only his conviction on Count One.

II

Before accepting a guilty plea, a district court must satisfy itself that there is a factual basis for the plea, meaning that the conduct the defendant admits “is sufficient as a matter of law to establish” the offense. *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010) (citing FED. R. CRIM. P. 11(b)(3)). Because Hernandez did not object to the factual basis, our review is for plain error. *Id.* (citing *United States v. Marek*, 238 F.3d 310, 315 (5th Cir. 2001) (en banc)).

Hernandez must show that “(1) there is an error; (2) the error is clear and obvious; and (3) the error affects his substantial rights.” *United States v. Garcia-Paulin*, 627 F.3d 127, 131 (5th Cir. 2010) (quoting *United States v. Castro-Trevino*, 464 F.3d 536, 541 (5th Cir. 2006)). An error is clear or obvious only when it is not “subject to reasonable dispute.” *Puckett v. United*

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States, 556 U.S. 129, 135 (2009) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). We assess that question under the law as it stands “at the time of appellate consideration.” *Henderson v. United States*, 568 U.S. 266, 279 (2013) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). In reviewing a factual basis for plain error, we take a “wide look” at the entire record and may draw “reasonable inferences” in support of the plea. *United States v. Escajeda*, 8 F.4th 423, 426 (5th Cir. 2021) (quoting and citing *United States v. Nepal*, 894 F.3d 204, 208 (5th Cir. 2018)). To show an effect on his substantial rights, Hernandez must show “a reasonable probability that, but for the error, he would not have entered the plea.” *United States v. Brandon*, 965 F.3d 427, 432 (5th Cir. 2020) (quoting *United States v. Castro-Trevino*, 464 F.3d 536, 541 (5th Cir. 2006)).

III

Count One charged a conspiracy under § 933(a)(3) to commit the receipt offense described in § 933(a)(2). Hernandez identifies two purported errors regarding the district court’s acceptance of his guilty plea on Count One. He contends that the record failed to establish a bona fide co-conspirator, and that it failed to establish that his receipt of the rifle “would constitute a felony” as required by § 933(a)(2). Even assuming *arguendo* that the district court erred in both respects, we conclude that neither asserted error was clear or obvious.

We begin with the conspiracy element. A conspiracy requires an agreement between at least two individuals who knowingly and voluntarily intend to pursue an unlawful objective. See *United States v. Montgomery*, 210 F.3d 446, 449 (5th Cir. 2000). However, “an ‘agreement’ with a government informant cannot be the basis for a conspiracy conviction because the informant does not share the requisite criminal purpose.” *Escajeda*, 8 F.4th at 426 (citing *United States v. Delgado*, 672 F.3d 320, 341

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(5th Cir. 2012) (en banc)). Relying on that rule, Hernandez argues that record plainly establishes that S.M. was a Government informant, so there could be no conspiratorial agreement.

We disagree. The rule Hernandez invokes turns on the co-conspirator's status when the conspiratorial conduct occurred. *United States v. Porter*, 68 F.3d 468 (5th Cir. 1995) (citation omitted). And we have long recognized that a criminal conspiracy can exist with an individual "prior to becoming an informer." *United States v. Asibor*, 109 F.3d 1023, 1032 (5th Cir. 1997) (citation omitted).

Here, the record supports a reasonable inference that S.M. was a bona fide co-conspirator who began cooperating with the Government only after he was stopped and arrested. It was the dealer, not S.M., that alerted the ATF to the transaction, and the investigation into Hernandez was already underway. S.M. agreed to speak to federal agents only after the traffic stop and after he received *Miranda* warnings. And the record describes an arrangement that S.M. entered for payment, completing the purchase form so that Hernandez could receive a firearm. From those facts, a court could reasonably infer that Hernandez and S.M. agreed to the scheme before any Government involvement, and that S.M. became an informant after the conspiracy was complete.

At a minimum, the record does not compel the contrary inference that S.M. acted at the Government's behest when the agreement was formed. The asserted insufficiency thus turns on a debatable inference about S.M.'s status as an informant and its timing, not on undisputed facts. Where the sufficiency of a factual basis depends on such an inference, and no decision of this court resolves the point, any error is not clear or obvious. *See Trejo*, 610 F.3d at 319–20 (declining to find plain error where the factual-basis

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challenge turned on a contestable inference that this court had not squarely addressed).

Hernandez separately argues that the factual basis failed to establish that his receipt of the firearm “would constitute a felony,” because the only felony the record identifies is the § 922(a)(6) false statement charged in Count Two, which he maintains was not his receipt. Neither the Supreme Court, nor this court, nor any other court of appeals has construed § 933(a)(2), and we have said that the absence of binding authority is “often dispositive” at the second prong of plain-error review. *United States v. Jones*, 88 F.4th 571, 573 (5th Cir. 2023) (quoting *United States v. McGavitt*, 28 F.4th 571, 577 (5th Cir. 2022)). We see no reason to depart from that general principle here. That’s especially true when we apply prongs three and four, asking whether Hernandez has shown a reasonable probability that he would not have entered this guilty plea. Hernandez does not contest his felony guilt on Count Two, yet seeks to vacate a sentence that gave him no prison time. Crucially, he identified to us the exact fact deficiency that led him to an abortive first re-arraignment, yet he then returned, with the same counsel, confirming that there was evidence to plead guilty on the conspiracy receipt count. Hernandez and the government, as well as the court, made note of the fact that guns trafficked to Mexico had previously been traceable to Hernandez, and Probation further noted the incongruity of Hernandez’s cash payment of almost \$40,000 for the charged, heavy weaponry he purchased here through a straw buyer who told law enforcement Hernandez wished to avoid detection, when Hernandez had not been regularly employed for more than half a decade. In view of this “wide look” at the record, reasonable inferences support Hernandez’s guilty plea.

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IV

We AFFIRM Hernandez’s conviction and sentence on Count One. However, we REMAND for the limited purpose of correcting a clerical error in the written judgment. The parties agree that the judgment’s description of Count One as “Aiding and Abetting the Trafficking of Firearms,” in violation of 18 U.S.C. §§ 2(a) and 933(a)(2), does not reflect the offense of conviction, a conspiracy, in violation of § 933(a)(3), to commit the receipt offense described in § 933(a)(2). On remand, the district court should correct the judgment accordingly. *See* FED. R. CRIM. P. 36.