

Opinion of STEVENS, J.

**SUPREME COURT OF THE UNITED STATES**

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No. 01–1184

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UNITED STATES, PETITIONER *v.* FRANCISCO  
JIMENEZ RECIO AND ADRIAN LOPEZ-MEZA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[January 21, 2003]

JUSTICE STEVENS, concurring in part and dissenting in part.

In accordance with *United States v. Cruz*, 127 F. 3d 791, 795–796 (CA9 1997), the District Judge charged the jury with the following instruction:

“A defendant may only be found guilty of the conspiracy charged in the indictment if he joined the conspiracy at a time when it was possible to achieve the objective of that conspiracy.” App. to Pet. for Cert. 75a–76a.

For the reasons stated in the Court’s opinion, that instruction was erroneous.

My reason for not joining the Court’s opinion without qualification is procedural. The relevant Rule in effect at the time of this trial provided: “No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.” Fed. Rule Crim. Proc. 30 (1988). The Government neither objected to the erroneous instruction at trial, nor bothered to question the validity of the *Cruz* decision on appeal to

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the Ninth Circuit.\* Although the Government did challenge *Cruz* in its petition for rehearing en banc, in my judgment that challenge came too late to preserve the question the Court decides today. Cf. *United States v. Williams*, 504 U. S. 36, 56–60 (1992) (STEVENS, J., dissenting). The prosecutor, like the defendant, should be required to turn square corners.

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\* Indeed, the Government embraced the flawed *Cruz* rule in its closing argument to the jury:

“So, in summary, assuming that you find that this conspiracy simply encompassed the one load, in order for each defendant to be found guilty, what must be proved beyond a reasonable doubt? That there was a drug conspiracy; number 2, it was limited to just the one load that was seized; the defendant joined that conspiracy, became involved in the conspiracy; the defendant joined or became involved *before the narcotics were seized* . . . . If one of those elements is missing, you must acquit. That’s the burden that’s placed on the United States, *one that we willingly accept.*” App. to Brief in Opposition 34a (emphases added).