IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6242

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLIPBERTO VALENCIA, NELIS ALOMIA MURILLO, LEONIDAS HERRERA, and LISENIA DOMINGUEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
CR H 91 39 04

June 3, 1993

Before KING, HIGGINBOTHAM, and DEMOSS, Circuit Judges.

PER CURIAM:[*]

Clipberto Valencia, Nelis Alomia Murillo, Leonidas Herrera, and Lisenia Dominguez were indicted for conspiracy to possess cocaine with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) & 846, and for aiding and abetting in the possession cocaine with the intent to distribute in violation of 21 U.S.C. §

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

841(a)(1) & 18 U.S.C. § 2. Valencia was additionally charged with using and carrying a firearm during the commission of a drug trafficking crime in violation of 18 U.S.C. § 924(c). Valencia, Herrera, and Dominguez were convicted of all counts in the indictment. Valencia was also convicted of the firearms count.[1] Murillo was convicted of the conspiracy count, but was acquitted of the aiding and abetting count. All the defendants have appealed. We affirm all of the defendants' convictions and sentences, except Murillo's conspiracy conviction, which we reverse on the ground that the evidence supporting that conviction was constitutionally insufficient.

I. BACKGROUND

A review of the record, viewing all of the evidence offered at trial in a light most favorable to the verdict,[2] reveals the following: In early 1991 in Houston, Texas, Gustavo Villanueva, an experienced drug trafficker, entered into an agreement with the Drug Enforcement Agency (the DEA) to act as an informant who would work under the supervision of DEA Agent Daniel Quintanilla.

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[1] The district court sentenced Valencia to a prison term of 136 months on the two drug counts to be followed by a 60-month consecutive term on the firearm count. Valencia was also sentenced to three terms of supervised release -- one for three years, a second for four years, and a third for five years -- to run concurrently. The district court sentenced Murillo to a prison term of 121 months. Herrera and Dominguez were each sentenced to prison terms of 151 months to be followed by two terms of supervised release -- one for five years, and a second for four years -- to run concurrently.

[2] See Jackson v. Virginia, 443 U.S. 307 (1979).

Villanueva informed the Government that he could assist them in convicting two other drug traffickers, Lisensia Dominguez and Leonidas Herrera, by spearheading an undercover sting operation. Villanueva contacted Dominguez and Herrera and informed them that he was acting as a representative for some out-of-town drug buyers who wished to purchase sixteen kilograms of cocaine at approximately $18,000 per kilo.

On February 5, 1991, Villanueva spoke with Herrera and informed him that the buyers would be arriving the coming weekend and that they initially wished to purchase three or four kilos. Later that day, Villanueva met with Dominguez, who served as Herrera's agent in the deal. During the meeting, Villanueva telephoned Herrera from a payphone. Herrera advised him that he was busy working on another drug deal and that Villanueva should call him back later.

On Friday, February 8, 1991, Villanueva again spoke with Herrera. The two discussed the sixteen kilos that the alleged out-of-town buyers wished to purchase ultimately. Herrera stated that he could deliver eight kilos on one day and another eight kilos on a later day. Villanueva suggested that they meet at a location convenient for the alleged out-of-town buyers. Herrera responded that he wished instead to meet at a particular location with which he was familiar. Villanueva acceded to Herrera's request and told Herrera he would contact him soon thereafter. A half-hour later, Villanueva telephoned Herrera and asked Herrera to deliver the cocaine to Villanueva's girlfriend's apartment.

Herrera refused and stated that it was taking too long to consummate the drug deal. Still later, Villanueva called again. This time he spoke to Dominguez, who told Villanueva to call back when Villanueva and his buyers reached a particular location in Houston. A half-hour later, Villanueva called back. Herrera stated that he wanted to call the deal off. Villanueva stated that they should postpone the deal for a few days.

Two days later, Villanueva once again telephoned Herrera, this time calling his pager. Dominguez responded to the page and informed Villanueva that Herrera had been arrested for driving while under the influence of alcohol and was in jail. Dominguez stated that she would henceforth handle the deal alone and that Villanueva should call her when the buyers were ready. On February 12, 1991, Villanueva called her and told her that the buyers wanted thirty kilos at the price of $18,000 per kilo. Dominguez responded that she could only provide sixteen kilos. She agreed to consummate the deal at Villanueva's residence the next day.

On the following day, Villanueva called Dominguez and informed her that he possessed the purchase money. He suggested that they meet at a local Burger King restaurant. Villanueva, accompanied by undercover officers posing as the buyers, met Dominguez at the Burger King. Dominguez was accompanied by an unidentified male who went only by the name "Eddie." Dominguez stated that she would go get the sixteen kilos while Eddie stayed with Villanueva and the buyers. Villanueva, Eddie, and the

undercover agents proceeded to go to Villanueva's apartment to await Dominguez's arrival with the cocaine. Eddie called Dominguez from Villanueva's apartment and was informed by Dominguez that she was unwilling to come to Villanueva's apartment and was unwilling to deliver all of the cocaine at one time.

Dominguez later arrived at Villanueva's apartment without any cocaine and stated that her supplier was "unfamiliar with the area" and, thus, was unwilling to deliver the cocaine there. Instead, she suggested that the deal be consummated the following week at an apartment in Houston. She also suggested that Agent Quintanilla, who was posing as one of the buyers, give her $15,500 up front. Agent Quintanilla asked her if she meant "the eight" -- i.e., the first installment -- and Dominguez responded that the money would be for "only one." Quintanilla told her to bring "the eight", and Dominguez stated that she might be able to do so later that evening.

After further negotiations and a flurry of phone calls made by Dominguez, she stated that her supplier could provide four kilos on that day. She stated that if four kilos was not satisfactory, she would attempt to procure a full eight kilos from an alternate supplier. Later that day, Dominguez stated that she had contacted a supplier and was ready to deal; she suggested that the transaction should occur at an apartment rented by an unidentified friend of Dominguez, who was only referred to as "La Chola." The undercover agents stated that

they wished to consummate the deal on the following day, February 14, 1991.

On February 14, Villanueva and the agents agreed to purchase the drugs at La Chola's apartment. Villanueva and the agents drove to the apartment in separate automobiles. After arriving, Villanueva went inside the apartment and stated that the buyers were waiting outside the apartment complex. Various DEA agents arrived at the apartment complex and began to conduct surveillance from a white van. Another undercover agent approached a payphone and apparently made a phone call.

Inside the apartment, Villanueva met Dominguez, as well as Clipberto Valencia, Nelis Alomia Murillo, and Carmen Escobar. Villanueva had not previously met Valencia, Escobar, or Murillo. The two new females -- Escobar and Murillo -- were identified as friends of Dominguez.[3] Villanueva then asked to see the "merchandise." Escobar responded that "her friend" had it outside the apartment and that she (Escobar) would go and retrieve it. After two false starts, Escobar ultimately left with Valencia. On their way out of the apartment complex they stopped and attempted to look into the DEA's unmarked white surveillance van.

Villanueva and the others waited inside the apartment until Escobar and Valencia returned. According to Villanueva's testimony at trial, Murillo, while waiting, acted in a nervous manner and more than once peered outside the window of the

[3] Escobar pled guilty and has not appealed.

apartment. Murillo also requested that Dominguez, who was in another room, come talk to her, apparently to allay her nervousness. The two looked out the window.[4] Eventually, Villanueva joined them in the room and also looked outside the window. Murillo noted that there was a white van and other cars outside in the parking lot that looked suspicious. From an outside payphone, Escobar then telephoned the apartment. Murillo answered it. After she hung the phone up, Murillo informed the rest of the people inside the apartment that Escobar and Valencia had decided that "they didn't want to do it" because of the presence of suspicious cars outside in the parking lot.[5]

As everyone was exiting the apartment complex, DEA agents

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[4] According to Villanueva's testimony at trial, "[t]he lady in the yellow shirt [Murillo], called [Dominguez] into the room, and I couldn't see both of them because I was in the living room . . . and they're both looking out the windows . . . ."

[5] As Villanueva stated during his trial testimony:

Q. [the Government's attorney:] Did the lady, Miss Murillo, . . . tell you what [Escobar] told her [during the phone call]?

A. Yes.

Q. What did she tell her?

A. That they saw the white van and the blue car and the other cars with some people in the apartment complex[?]

Q. Uh-huh.

A. And they didn't want to do it.

Q. And then what happened?

A. Then I act nervous and told them that I better go . . . .

arrested them. Valencia and Escobar were apprehended as they attempted to drive away in Valencia's automobile. A loaded .45 caliber handgun was found underneath the steering wheel in the front seat compartment of the car. The agents also arrested Dominguez and Murillo, who were driving in Dominguez's car. Out of an abundance of caution, the agents applied for a search warrant to permit them to break into the locked trunk of the car. After the warrant was obtained, the agents found four kilos of cocaine in the car's trunk.

II. ANALYSIS

(i) Was the search of the trunk of Valencia's car unconstitutional?

Valencia argues that the affidavit supporting the search warrant authorizing the search of the trunk of his car, in which four kilos of cocaine were discovered, contained a material falsehood and was thus a violation of Franks v. Delaware, 438 U.S. 154 (1978). Rather than claiming that the affidavit contained a intentional misstatement of specific facts, Valencia claims that the DEA Agent who proffered the affidavit lied about which officers had personal knowledge regarding the facts surrounding the arrest and seizure of the car. Such information supported the magistrate's determination that probable cause existed. Valencia correctly observes that magistrates regularly rely on the established credibility of particular police officers in issuing warrants. He further argues that a necessary corollary to the "good faith" exception to the probable cause

requirement[6] is that a police officer/affiant must be completely candid with a magistrate about the source of his or her information. The Government does not dispute this abstract legal argument but instead argues that Valencia has not shown that the DEA agent who gave the affidavit misinformed the magistrate about the source of the information in the affidavit.

There is no need to address this argument, however, because it is well-established that no warrant is required to search an automobile if police have probable cause to believe that contraband is contained within the car. See, e.g., California v. Acevedo, 111 S. Ct. 1982, 1991 (1991). The Court has long held that merely because the car's owner or driver has been arrested and taken into custody does not preclude the application of the "automobile exception." See, e.g., Chambers v. Maroney, 399 U.S. 42 (1970); Texas v. White, 423 U.S. 67 (1975). In the instant case, the DEA agents had more than probable cause to engage in a warrantless search of Valencia's car under the "automobile exception." First, the agents had been dealing closely with two of the defendants for numerous days, and they had made it quite clear that a drug transaction would take place at the time the arrest and seizure of the car occurred. The police also relied on information provided by Villanueva, a confidential informant. The other three defendants -- one of whom was Valencia, the driver and owner of the searched car -- were clearly associated with the other known drug dealers. Furthermore, Valencia had

[6] See Leon v. United States, 468 U.S. 897 (1984).

been serving as a look-out for the others; he had even approached the DEA's surveillance van and attempted to look inside it. Finally, the DEA agents themselves observed all of the defendants going in and out of the apartment where the drug transaction was supposed to occur. When the drug transaction terminated and the defendants exited the apartment, DEA agents observed Valencia get in his car and begin to drive away. At that point, they arrested him. It cannot be realistically argued that the agents would not likewise have possessed probable cause to search his car, including its trunk.[7] Therefore, Valencia's Franks argument fails.

(ii) Did the district court abuse its discretion under Rule 611 of the Federal Rules of Evidence or violate the confrontation clause by limiting the scope of the cross-examination of a DEA agent regarding procedures outlined in a DEA manual?

The prosecutor, while on direct-examination of one of the arresting DEA agents, asked the agent about a certain procedure that was contained in a DEA manual which required DEA agents to search informants before a rendezvous. During cross-examination of the same DEA agent, defense counsel for Dominguez began questioning the agent about separate procedures in the DEA manual regarding surveillance. The prosecutor immediately objected to the line of questioning. The defense attorney responded that he

[7] Probable cause may rest on the collective knowledge of all arresting officers so long as there is communication between them, see Charles v. Smith, 894 F.2d 718, 724 (5th Cir. 1990). There is no dispute that such communication occurred in the instant case.

was "going into [the agent's] training and background just the way [the prosecutor] did" regarding the DEA manual's procedures on frisking informants. The defense attorney further stated "I'm going to get into other areas regarding the handling of the informant, and whether it was in conformity with his training." The court ruled that it would not permit a "fishing expedition"; such questioning was to be limited to inquiries about the DEA manual that related to specific instances in the investigation of the defendants. When the defense attorney then stated that his chief interest was in the procedures governing surreptitious tape-recordings by informants, the court held that counsel could inquire into whether DEA policy required all conversations between the informant and the defendants to be taped and, if so, why all the conversations in the instant case were not taped.[8] "[B]ut beyond that I don't think it's important or relevant," the district court ruled.

On appeal, Valencia and Herrera argue that the district court erred, both as a matter of evidence law[9] and under the Sixth Amendment confrontation clause, by limiting the scope of the cross-examination in this manner. Specifically, it is contended that, by limiting the scope of the cross-examination, the district court prevented the defense from "challeng[ing] a false impression left by a witness on direct examination. In the

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[8] The informant, Villanueva, testified about the content of the other, unrecorded conversations.

[9] See FED. R. EVID. 611(b) ("Scope of Cross-Examination").

instant case, the Government left the impression on direct examination that the agents followed acceptable procedures of the DEA." This argument is meritless. First, the "impression" left was not prejudicial to the defense in any meaningful way. The trial was not over the DEA's failure to abide strictly by DEA procedures. Rather, it was over criminal acts committed by the defendants. Unless the defense had alleged that some specific internal agency policy was intentionally not followed -- so as to suggest that the agents were hiding something -- the defendants had no right to inquire into the DEA manual's procedures. The defense has not alleged that a specific established procedure in the DEA's investigation of the defendants was intentionally or recklessly ignored in an manner that has corrupted the truth-seeking process.[10] Finally, if the Government's inquiry into the DEA procedures on direct examination of the DEA agent was improper, then the defense should have objected on relevancy grounds instead of raising their present claim.

This court reviews a district court's decision to limit the scope of cross for an abuse of discretion. See United States v. Ellender, 947 F.2d 748, 761 (5th Cir. 1991). There was no such abuse of discretion here. Nor do we believe that there was a confrontation clause violation. This is not a case where the

[10] Instead, the defense makes the sweeping claim that "[b]y restricting the cross examination, the District Court deprived the defendants of the opportunity to show, if they could, the failure of the investigators to follow proper procedures to ensure that the investigation was conducted in such a way as to guarantee the accuracy of its findings."

Government refused to disclose the identity or other important information about a confidential informant. See, e.g., Roviaro v. United States, 353 U.S. 53 (1957). Rather, it is a case where the defense wished to obtain general information about how the Government worked with an informant. Because the district court correctly concluded that the defense failed to offer a specific reason why such information was relevant, we find no error, constitutional or otherwise.

iii) Did the district court err by denying Herrera's motion for a mistrial or severance after another co-defendant's trial counsel "opened the door" to cross-examination of a Government witness, which elicited prejudicial information not brought out during the Government's case-in-chief?

In a multifarious claim, Herrera argues that the trial court committed an error of both statutory and constitutional dimension by failing to grant his motion for a severance or mistrial following the Government's cross-examination of a DEA agent. That motion contended that counsel for another co-defendant, Murillo, had unnecessarily "opened the door" to the Government's cross-examination of the DEA Agent, which elicited information that was highly prejudicial to Herrera. On appeal, Herrera argues that the district court's ruling permitting the cross-examination and subsequent denial Herrera's motion for a mistrial or severance violated a panoply of Herrera's rights -- his Sixth Amendment right to effective assistance of counsel (based on co-counsel's errors), his Fifth Amendment right to due process, and his right under Rule 14 of the Federal Rules of Criminal

Procedure, which governs joinder and trial severances. With respect the ineffective assistance claim, Herrera argues that because of Murillo's counsel's actions, Herrera's trial counsel was rendered constitutionally ineffective. The due process claim is simply a restatement of the ineffective assistance claim. The Rule 14 claim argues that the district court's refusal to grant the joint motion for severance or a mistrial was an abuse of discretion. As the Government points out, Herrera raised only the Rule 14 claim at trial; the two constitutional claims are raised for the first time on appeal and, thus, are judged under the plain error standard. See FED. R. CRIM. P. 52(b).[11] We believe that none of Herrera's rights, constitutional or statutory, was violated.

After the Government had rested its case-in-chief, counsel for Murillo called as a witness a DEA agent who had not been previously called by the Government. Counsel for Murillo asked only a few questions about a certain meeting that had taken place on February 13, 1991, between the agent, the informant, and Dominguez. Herrera, who was then in jail on DWI charges, was not

[11] Ordinarily, in order to bring a Sixth Amendment ineffective assistance of counsel claim, a defendant need not raise the claim at trial in order to preserve it for later proceedings. Requiring such an objection would be unrealistic, as the perpetrator of the alleged constitutional error -- trial counsel -- is the very one who would have to preserve such a claim. However, in the instant case, trial counsel should have raised such a claim, since the basis of the claim was conduct of a co-defendant's counsel.

present at that meeting.[12] On cross-examination of the DEA agent, the prosecutor largely ignored Murillo's involvement and instead asked the agent if he believed that Herrera was still involved in the drug conspiracy at the time of that meeting.[13] Counsel for Herrera, who had not called the DEA agent as a witness, objected that such a cross-examination was improper. The district court held that the questioning was proper: "[n]one of this would be coming up if somebody [i.e., counsel for Murillo] hadn't called him [the agent]." Counsel for Murillo responded that he had not intended to "open the door" for such questioning on cross-examination, to which the district court responded: "This examination could have been over if you had simply stuck with what you told me you were calling him for [which did not concern the February 13, 1991 meeting]. No, [instead] you wanted to take him through the whole gam[ut]." Counsel for Herrera then interrupted and argued, "[y]our honor, I didn't call [the DEA agent], and no questions came up on direct

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[12] A major issue at trial was whether Herrera was a member of the same criminal conspiracy that was involved in the drug transaction that led to the arrest. Herrera was not present at the scene of the arrest, as he was still in jail following an earlier, unrelated arrest for DWI. It is undisputed that, in the days before his arrest, Herrera was actively involved in the original negotiations with undercover DEA agents and Villanueva, the informant.

[13] The prosecutor asked the DEA agent, "[b]ased upon the conversations that you heard in there when you were talking were you under the impression . . . that there was another individual involved name Leo or Leonidas [Herrera]?" After the court overruled Herrera's defense counsel's objection, the agent testified that he did have the impression that Herrera was still a member of the conspiracy at the time of the meeting.

[conducted by counsel for Murillo] concerning my client." Counsel for Herrera argued that his client was unduly prejudiced by the court's willingness to allow the Government to question the DEA agent on cross-examination about whether he believed that Herrera was still a part of the conspiracy on February 13, 1991, even though he was in jail. The district court overruled the objection. Herrera proceeded to file a motion for severance or a mistrial, which the district court also denied.

Herrera's ineffectiveness claim attempts to circumvent the rigors of Strickland v. Washington, 466 U.S. 668 (1984),[14] by arguing that this purported Sixth Amendment violation more resembles a conflict-of-interest species of ineffectiveness, see Cuyler v. Sullivan, 446 U.S. 335 (1980), than a typical Strickland claim. We do not believe that Herrera has raised a cognizable Sixth Amendment claim of any species because his trial counsel did nothing objectionable. Rather, Herrera complains about the actions of a co-defendant's counsel. Thus, we only address Herrera's due process claim.

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[14] Strickland sets forth a two-pronged standard. The first prong asks whether counsel's performance was "deficient" under an objective standard of reasonableness; the second prong asks whether any deficiencies "prejudiced" a defendant. Establishing "prejudice" under Strickland requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. To show deficient performance, a defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. A court need not address both components of this inquiry if the defendant makes an insufficient showing on one. Id. at 697.

First, however, this court must decide if there was a Rule 14 violation; if so, there is no need to reach the constitutional claim. Rule 14 provides as follows:

> If it appears that a defendant . . . is prejudiced by a joinder of . . . defendants [and]. . . by such joinder for trial together, the court may . . . grant a severance of defendants or provide whatever relief justice requires. . . .

Rule 14 rulings by a trial court are reviewed on appeal under the abuse-of-discretion standard. See United States v. Ellender, 947 F.2d 748, 754 (5th Cir. 1991). This court has further declared that, "[o]n appeal a defendant has an `extremely difficult burden,' since denial of a motion for severance will be reversed only when [the defendant] demonstrates specific compelling prejudice that actually results in his having received an unfair trial." United States v. Greer, 939 F.2d 1076, 1095 (5th Cir.), reinstated in part, 948 F.2d 934 (5th Cir. 1991) (en banc).

Rather than proceed with a discussion of whether such "specific compelling prejudice" was established by Herrera, this court may dispose of this claim on the ground that "severance [under Rule 14] is not required if [the evidence that was introduced as a result of a joinder of defendants] would nonetheless have been admissible against the defendant seeking severance if the severance were granted." United States v. Basey, 816 F.2d 980, 1004 n.43 (5th Cir. 1987). In the instant case, the evidence that was brought out on the Government's cross-examination of the DEA agent after counsel for Murillo "opened the door" on direct examination would have been

admissible had the Government chosen to call the testifying DEA agent during its case-in-chief.[15] Furthermore, as the Government notes, the prosecution was always free to re-open its case. See United States v. Walker, 772 F.2d 1172, 1177 (5th Cir. 1985).

These considerations apply equally to our analysis of Herrera's due process claim, which is reviewed for plain error. Even assuming arguendo that the rule in Basey, supra, does not apply, it is not as if counsel for Murillo committed any gross error. He simply questioned a witness in defense of his client. He did not specifically ask the DEA agent about Herrera. Simply because Murillo's counsel's questioning inspired the Government to question that witness about another matter that was not raised previously in the Government's case hardly seems to rise to the level of constitutional error, particularly "plain error." This is especially so when the Government could have called the DEA agent as its own witness and questioned him about Herrera in the first place. Finally, it was not as if counsel for Murillo directly elicited some prejudicial information from the agent of which the Government was not otherwise aware. The Government's

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[15] The testifying DEA agent was simply asked to opine whether he believed that Herrera was part of the drug conspiracy even though he was in jail. The Federal Rules of Evidence permit a witness to render an opinion, even about an "ultimate issue" such as whether a conspiracy existed, so long as the witness formed the opinion based on a rational perception and the testimony is helpful to the jury. See FED. R. EVID. 701, 704; but cf. United States v. Arenal, 768 F.2d 263, 269-70 (8th Cir. 1985); Apex Oil Co. v. Dimauro, 1990 U.S. Dist. LEXIS 10867 at *4 (S.D.N.Y. August 21, 1990) ("Witnesses may not testify as to their opinions regarding the existence of a `conspiracy' . . . .") (civil conspiracy case).

entire case against Herrera was aimed at proving that he remained a part of the conspiracy even after he was arrested and jailed for DWI. At most, counsel for Murillo "opened a door" to which the Government already had a key. The district court did not violate Herrera's due process rights by refusing to grant Herrera's motion for a mistrial or severance.

iv) Did Dominguez and Herrera have a right to a finding by a jury (as opposed to a judge) regarding the quantity of cocaine that was possessed?

Dominguez and Herrera requested that the trial court permit the jury to decide, for purposes of sentencing, the amount of cocaine that the defendants possessed. The defendants argue that under the traditional constitutional allocation of judge and jury responsibility in criminal cases, a jury should decide such a quintessential fact question, particularly in view of the amount of drugs a convicted defendant is found to have possessed is determinative of the applicable sentencing range under 21 U.S.C. § 841(b).

This claim has been raised in other Fifth Circuit cases and has been repeatedly rejected. See, e.g., United States v. Royal, 972 F.2d 643, 650 (5th Cir. 1992); cf. United States v. Greenwood, 974 F.2d 1449, 1459 (5th Cir. 1992) (no right to lesser-included "offense" instruction on quantity of illicit drugs; quantity not "element" of crime under § 841); but cf. United States v. Rigsby, 943 F.2d 631, 642 (6th Cir. 1991) (disapproving of rule, but recognizing that court was bound by

circuit precedent), cert. denied, 112 S. Ct. 1269 (1992). Thus, we reject this claim.

v) Did the district court err, during sentencing, by finding that Dominguez and Hererra conspired to possess eight kilos of cocaine with the intent to distribute?

Herrera and Dominguez both argue that the district court erred during sentencing in finding that they conspired to possess eight kilos of cocaine, when the other co-defendants were sentenced based on the court's finding that they possessed four kilos. The Government points out that only Dominguez objected to this finding below. Whether the claim is reviewed for "plain error" or for "clear error" (as this court is reviewing a factual finding), compare FED. R. CIV P. 52(a) (district court's fact-findings reviewed for clear error), with FED. R. CRIM. P. 52(b) ("plain error" standard of review if error not preserved at trial), the record supports the district court's finding.

The district court stated that "in my opinion the tapes and transcripts and the evidence indicates that the parties negotiated for an amount of cocaine in excess of, or at least they commenced negotiating cocaine delivery of 16 kilograms, later reduced to eight kilograms to be made and delivered in two separate deliveries of four kilos each . . . ." Herrera and Dominguez argue that the drug negotiations were ever-changing and that at no point was there a meeting of the minds between the two

defendants and Government agents for eight kilograms.[16] Rather, the two defendants contend that at most four kilos were firmly negotiated.

We disagree. Our review of the record reveals that Dominguez, openly acting as Herrera's representative in the negotiations during the time after he was in jail on DWI charges, reached an agreement for at least eight kilos.[17] Although Herrera was in jail when this agreement was reached, the district court found that the agreement was reasonably foreseeable by Herrera, who had originally led the preliminary negotiations for sixteen or more kilos. We do not believe that this fact-finding was clearly erroneous. Thus, the district court properly calculated Herrera and Dominguez's sentences based on eight rather than four kilos of cocaine.

vi) Did the district court correctly apply the Sentencing Guidelines by finding that Valencia had obstructed justice within the meaning of U.S.S.G. § 3C1.1?

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[16] We observe that the Sentencing Guidelines permit sentencing decisions in drug conspiracy cases to be based on the amount negotiated -- as opposed to the amount of drugs that actually changed hands -- so long as the defendant during the negotiations intended to deliver and was capable of delivering the amount negotiated. See U.S.S.G. § 2D1.4 (Application Note 1).

[17] As noted in supra Part I, at one point Dominguez agreed to supply sixteen kilos. The undercover agents and the informant even produced money for the drugs, but Dominguez ultimately backed out of the deal. Nevertheless, she negotiated for the sixteen kilos and was capable of producing; she did not consummate the deal only because of her supplier's alleged fear of delivering the full amount in a single delivery.

U.S.S.G § 3C1.1 provides for a two-level increase in a defendant's offense level when a defendant obstructs or attempts to obstruct justice during the Government's investigation of the crime. In the instant case, one of the co-defendants, Valencia, was arrested while he was attempting to drive off from the scene of the drug transaction. The DEA agents asked him if the car was his and if he had a key to the trunk. Valencia denied that the car was his and denied having a key to the trunk. Valencia was later taken to a holding cell in a federal building. Meanwhile, the DEA agents found other means to get into the trunk, where cocaine and papers showing that Valencia was the car's owner. A short time later, a janitor working in the federal building discovered a car key in a toilet in a bathroom that Valencia had repeatedly used. The key fit the trunk to the car. The district court held that this was an attempt to obstruct justice and assessed a two-level increase in Valencia's offense level.

Valencia argues that this was improper because the key was not "material evidence," as required by § 3C1.1's commentary. The Government argues that the key was "material" because it potentially was evidence that would show that Valencia possessed dominion over the trunk where the cocaine was found. Because the key was discovered, Valencia could not make the argument that he lacked scienter because he had no access to the trunk. Had the key not been found, Valencia could have made that argument at trial. We agree with the Government.

Valencia also argues that his attempted destruction of the key is analogous to defendants who attempt to swallow drugs at the time of arrest, who are ordinarily not punished under § 3C1.1 (Application Note 3(d)). The Government argues that Valencia's actions are distinguishable from actions such as drug-eating at the moment before arrest because Valencia had time to "coolly deliberate" over whether to hide the key. The Eight Circuit has articulated such a distinction. See United States v. Lamere, 980 F.2d 506, 515 n. 6 (8th Cir. 1992) ("We read this limited exception to include only conduct admitting a spontaneous or visceral or reflexive response occurring at the point the arrest became imminent . . . ."). We agree that this distinction is appropriate. Therefore, we hold that the district court did not err in assessing Valencia a two-level increase in his offense level.

vii) Did the district court fail to make sufficient factual findings regarding its ruling under U.S.S.G. § 2D1.1(b)(1) that Herrera had constructive possession of a firearm?

The district court assessed a two-level increase in Herrera's offense level because the court found that Herrera had constructive possession of a firearm. See U.S.S.G. § 2D1.1(b)(1). Herrera, who was in jail at the time of the crime, does not dispute the sufficiency of the evidence to support the district court's finding, but instead simply argues that a remand is appropriate because the district court failed properly to articulate its findings. See Hooten v. United States, 942 F.2d

878, 881-82 (5th Cir. 1991). The Government counters that the district court did make adequate findings by expressly adopting the specific portions of the probation officer's presentence investigation report in which such findings were indisputably made. The Government is correct that adopting the PSI is adequate "fact-finding" by the district court so long as the defendant had an opportunity to file objections to the PSI, which he did here. See United States v. Ramirez, 963 F.2d 693, 706-07 (5th Cir. 1992). The district court expressly overruled Herrera's objections to the PSI and adopted it. We see no need for a remand.

(viii) Is the evidence is constitutionally sufficient to support Murillo's conviction of aiding and abetting the possession of cocaine with the intent to distribute?

Co-defendant Murillo challenges the constitutional sufficiency of the evidence supporting her conviction for aiding and abetting her co-defendants in possessing cocaine with the intent to distribute.[18] In reviewing a sufficiency claim, we must ask "`whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Guzman v. Lensing, 934 F.2d 80, 82 (5th Cir. 1991) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). It is undisputed that Murillo was not part of the Government's

[18] Murillo was acquitted of conspiracy to possess cocaine with the intent to distribute.

original investigation; rather, she did not come into the picture until immediately before the arrest. She was present at the apartment at which the drug transaction was nearly consummated. She also acted in a nervous fashion, repeatedly looked out the window, and commented that certain vehicles in the parking lot appeared suspicious. She also answered a telephone call from Escobar and relayed Escobar's message that "they didn't want to do it." She was arrested while driving away from the apartment with Dominguez.

It is well-established that a party's mere presence at the scene of a crime alone is insufficient to support a conviction for aiding and abetting a crime. See, e.g., United States v. Martiarena, 955 F.2d 363, 367 (5th Cir. 1992). Rather, to prove aiding and abetting in a criminal venture, the prosecution must prove that the defendant: i) associated with the criminal enterprise, ii) participated in the venture, and iii) sought by action to make the venture succeed. See United States v. Stone, 960 F.2d 426, 433 (5th Cir. 1992). When a drug defendant is accused of aiding and abetting possession with the intent to distribute, the Government must also prove the above three elements of aiding and abetting with respect to both possession and intent to distribute. See United States v. Longoria, 569 F.2d 422, 425 (5th Cir. 1978).

We agree that Murillo in some sense "associated" with the criminal venture. However, we believe that the Government failed to offer constitutionally sufficient evidence to prove beyond a

reasonable doubt that Murillo "participated" in the criminal venture and "sought by action to make the venture succeed." Unlike the other two co-defendants who first appeared on the day of the arrest -- Escobar and Valencia, who were Dominguez's suppliers of the cocaine -- Murillo did not in any meaningful way become involved in consummating the transaction.[19]

Nor do we believe that Murillo's actions while in the apartment constituted aiding and abetting. The Government argues that Murillo served as a "lookout,"[20] and also had a role in terminating the transaction by relaying Escobar's telephone message. We believe that nervously glancing out the window and commenting that cars looked suspicious does not qualify as serving as a "lookout," as the Government claims. An innocent party who is in the company of persons involved in a criminal venture would naturally be nervous that law enforcement authorities were monitoring the criminal activity. Yet such nervousness does not demonstrate that the person shared in the actual perpetrators' criminal intent. United States v. Martinez, 555 F.2d 1269, 1271 (5th Cir. 1977) ("To aid and abet means to

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[19] We observe that the Government never offered any proof that the apartment was rented by Murillo. Had the Government offered sufficient proof that Murillo was in fact the woman whom Dominguez had referred to as "La Chola," our holding would be different.

[20] See United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir. 1990) (evidence that defendant provided surveillance and security for principal sufficient to prove aiding and abetting of possession with intent to distribute); United States v. Kaufman, 858 F.2d 994, 1002 (5th Cir. 1988) (same); United States v. Martinez, 555 F.2d 1269, 1279 (5th Cir. 1977) (same).

assist the perpetrator of the crime while sharing in the requisite criminal intent."). Nor does glancing out a window and commenting that automobiles appeared suspicious -- actions that logically follow from one's nervous condition -- demonstrate that the party intended to aid and abet those in the criminal venture. It was not as if Murillo stated that the transaction should be called off because of her fears -- an action that one would expect of an actual lookout. Finally, Murillo's answering the phone and relaying Escobar's message did not aid and abet, in that Murillo did nothing but announce a fait accompli. Contrary to what the Government argues, there is no evidence that Murillo herself was a part of the decision-making process regarding the termination of the planned drug transaction.

In sum, we reverse Murillo's aiding and abetting conviction on the ground that the Government's evidence was constitutionally insufficient.

III.

For the foregoing reasons, we AFFIRM the convictions and sentences of co-defendants Valencia, Hererra, and Dominguez, and REVERSE the conviction of co-defendant Murillo. We REMAND to the district court to enter a judgment of acquittal in Murillo's case.