IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-7013

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KIM BANKS and WILLIE HUGH MORRIS,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas
(CR 4 91 14 A)

(November 19, 1992)

Before POLITZ, Chief Judge, JOHNSON, and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

Willie Hugh Morris and Kim Banks were each convicted of one count of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. Morris was also convicted of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i). Morris and Banks appeal both their convictions and their sentences. We find all of the arguments presented by Morris and Banks to be without merit and we therefore affirm.

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

Morris and Banks were arrested in 1990 for their involvement in the trafficking of cocaine. This investigation began on June 18, 1990, when special agents met with Ashutosh Sharma and a confidential informant in Houston, Texas. Sharma proposed to buy twenty kilograms of cocaine from the agents and told the agents that they could be selling much larger amounts of cocaine on a regular basis if this transaction went well. Sharma also indicated that the people who wished to purchase the cocaine were from Houston. A second meeting was held a few days later. Sharma was allowed to test a sample of heroin and again stated that if this deal went well large cocaine deals would be a real possibility in the near future.

At this point, Sharma contacted Serbjeet Ahluwalia. Sharma told Ahluwalia that he had a quantity of cocaine he wanted to sell and asked Ahluwalia if he knew someone who would like to buy it. Ahluwalia approached Banks, who ran an agency that sold concert tickets in large quantities to persons reputed to be in the cocaine business. Banks told Ahluwalia that he probably knew someone who would be interested in purchasing the cocaine from Sharma.

On June 28, Banks and Ahluwalia flew from Houston to Dallas to meet with "Boot," identified at trial as Morris. Banks had told Ahluwalia that Morris was interested in buying the cocaine and wanted to talk about a deal. At the airport, Banks and Ahluwalia met Morris and Charles Malone, another defendant in the case.

Banks had carried with him to Dallas a heroin sample that Sharma had given him to show Morris that Sharma was serious about conducting a drug transaction. Banks gave Morris the packet containing the heroin, Morris cut and weighed the sample, and another man came and picked it up. Morris, Banks, and Ahluwalia then dropped off Malone and drove to Morris's ranch. At this point Morris agreed to purchase cocaine from Sharma the next day. That afternoon, however, Morris decided that he wanted to fly back to Houston with Banks and Ahluwalia and have someone else deliver the money. Morris, Banks, and Ahluwalia left Morris's ranch that night to fly to Houston and arrange the deal. On the way to the airport, Banks and Ahluwalia were given T-shirts depicting neighborhoods that Morris said he "controlled" and where he sold his drugs. Morris told Malone to stand by and wait for the shipment to come because he was going to send him ten kilograms of cocaine.

That evening, Morris, Banks, and Ahluwalia purchased airline tickets to Houston. Morris then found out that he had a problem with the person who was to handle the money, so he told Banks and Ahluwalia to go ahead and he would meet them in Houston the next morning and bring the money himself. Banks and Ahluwalia arrived in Houston later that night, and Ahluwalia told Sharma that Morris would be there the next morning with the money.

Morris arrived in Houston the next morning and rented a hotel room. Banks and Ahluwalia met Morris in his hotel room, and Morris gave Banks the money to take to Ahluwalia's apartment. Banks took

the money from Morris and went to the apartment; Morris and Ahluwalia arrived at the apartment later. At this time, Morris, Banks, and Ahluwalia met with Sharma. After being contacted by Sharma, the informant came to the apartment, looked at the money, and left to get the cocaine. Ahluwalia told the informant that they wanted ten kilograms now and fifteen later, for a total of twenty-five kilograms. Sharma went with the informant to get the cocaine.

A short time later Sharma called Ahluwalia and told him to meet him with the money. Sharma and Ahluwalia then went to the informant's apartment and shortly thereafter two federal agents, posing as the informant's "contacts," arrived. One agent discussed the deal with Sharma and Ahluwalia while the other agent examined the money, which he estimated to be between $170,000 and $180,000. The agents went to their vehicle and returned with ten kilograms of cocaine which they presented to Ahluwalia and Sharma. As soon as Ahluwalia began cutting the cocaine, the agents arrested him and Sharma. The sum of $174,820 was seized and, after securing the evidence, the agents went to Ahluwalia's apartment and found Morris.

Morris told the agents that he was in town to gamble. Morris consented to a search of his hotel room, and the agents found an airline ticket and a pager for Pac-Tel Paging. Morris admitted that his nickname was "Bootnose," and the agents arrested him. Banks, along with his wife, returned to Ahluwalia's apartment while

the agents were in the process of questioning Morris. Banks was arrested several months later.

A search of Morris's residence at 3840 Wedgeworth Road, Fort Worth, Texas, revealed a document on which was written "Bo," which is Banks's nickname. Near the word "Bo" was the telephone number of Banks's wife and the business telephone number of Banks's ticket agency partner. Records showed that two calls were made from Banks's home on the evening of June 29, 1990, to a pager later found in Morris's possession. A search of Morris's ranch near Cresson, Texas, resulted in the seizure of gelatin capsules, which are used in the distribution of heroin and cocaine.

After Morris's arrest, he told Ahluwalia to stay quiet and everything would be all right. After Morris learned the identity of the confidential informant, he told Ahluwalia that he would find him and get back at him. Morris also told Ahluwalia that the approximately $170,000 seized in this transaction was the proceeds of prior drug sales.

Following a plea agreement, which was introduced into evidence, Ahluwalia testified against Morris and Banks at trial. Morris and Banks were each found guilty.[1] Morris was sentenced to 365 months on the first count and 240 months on the second count, to run concurrently, followed by a five-year term of supervised release on the first count to run concurrently with a three-year

[1]Malone was also indicted but was found not guilty.

term of supervised release on the second count, and a special assessment. Banks was sentenced to 210 months to be followed by a period of five years of supervised release and a special assessment. Both Morris and Banks appeal.

II

On appeal, Morris asserts four errors by the district court. First, Morris argues that the district court erred in overruling his motion to suppress evidence. Second, Morris argues that there was a failure of proof on venue and jurisdiction. Third, Morris argues that there was insufficient evidence to convict him of money laundering. Fourth, Morris argues that the district court erred in determining the base level offense and upward adjustments for sentencing purposes.

On appeal, Banks asserts five errors by the district court. First, Banks argues that the district court erred when it admitted evidence of his subsequent personal drug use in violation of rules 401, 403, and 404 of the Federal Rules of Evidence. Second, Banks argues that the district court erred in denying his specially requested jury instruction concerning lack of flight. Third, Banks alleges that the government's use of its peremptory challenges to exclude prospective African-American jurors solely on account of their race violated the equal protection clause. Fourth, Banks argues that the district court erred in finding that the relevant offense conduct was based on a total of twenty-five kilograms instead of ten. Fifth, Banks argues that the district court erred

in failing to find that he was a minor participant in the conspiracy.

III

A

We first address Morris's arguments concerning the guilt phase of his trial. Morris argues that the district court erred in overruling his motion to quash evidence seized at his residence and his ranch because the evidence was found pursuant to invalid search warrants. In reviewing a district court's ruling on a motion to suppress, our task is to determine whether there is sufficient evidence to support the district court's conclusion. United States v. Wake, 948 F.2d 1422, 1426 (5th Cir. 1991), cert. denied, __U.S.__, 112 S.Ct. 2944, 119 L.Ed.2d 569 (1992). We review a district court's findings of fact on a motion to suppress under the clearly erroneous standard. Id. at 1425-26. The evidence is viewed in the light most favorable to the prevailing party, in this case the government. United States v. Piaget, 915 F.2d 138, 140 (5th Cir. 1990).

B

The government presented evidence against Morris that it had discovered during two searches based upon federal warrants. The first warrant was for a search of Morris's residence. Pursuant to a state search warrant, state officers had previously searched this address to look for a .38 semi-automatic firearm used in connection with a murder. The state search warrant was based on an affidavit

of a state officer relying on information from an eye witness to the murder who identified Morris as the person who had shot and killed the victim. While conducting their search, the state officers noticed incriminating documents relating to Morris's ownership of real property, documents relating to travel by Morris to California and Florida, and other financial records.[2] The state officers called federal officials and told them about these documents. The affidavit supporting the federal search warrant of Morris's residence contained this information. In addition, the affidavit stated that in the course of a five-year narcotics investigation, several informants had advised the affiant that Morris was supervising a large scale drug trafficking organization. The affidavit also described the events for which Morris was charged in the instant case, noted that this residence was the scene of a discussion for a cocaine transaction, and contained a statement made by Morris to Banks that he monthly distributed fifty or more kilograms of cocaine. During the search of Morris's residence, federal officers discovered several documents that showed an apparent business relationship between Morris and Banks. Five days later, federal officials secured a search warrant for Morris's ranch based upon Ahluwalia's testimony that Morris supervised a large scale drug trafficking organization from the ranch.

[2]The search did not reveal the firearm.

Morris first argues that the state officials had no probable cause for the original search of his residence for the firearm. Morris argues that the federal magistrate should not have considered the information the federal officials learned from the state officials in determining whether there was probable cause to search. In the absence of this information, Morris suggests that there was no probable cause for the issuance of a federal search warrant to search his house. Morris further asserts that there was no probable cause for the search of his ranch.

Irrespective of whether there was probable cause for a search, evidence obtained from a search may still be admissible under the "good faith" exception to the exclusionary rule. United States v. Leon, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 3420, 82 L.Ed.2d 677 (1984). In this case, Morris raises only one objection to the application of the good faith doctrine: he argues that the warrants were based upon information so lacking in probable cause as to render official belief in the existence of probable cause unreasonable.[3] We disagree.

The federal warrants were based on information that revealed a long standing pattern of criminal activity arising from both Morris's residence and his ranch. The affidavit on which the

[3]On appeal, Morris also argues that this evidence should have been excluded under the "fruit of the poisonous tree" doctrine. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Because Morris did not raise this argument at the trial level, however, it is not properly before this court. We therefore reach no conclusion on this issue.

search of Morris's residence was based contained information from state officials who were conducting a search pursuant to a warrant based upon evidence that Morris had murdered a seventeen-year-old boy. The state officers actually saw the incriminating documents. Furthermore, irrespective of the observations made by the state officers, the affidavit contained information that Morris had used his residence to discuss drug transactions and that he was involved in the trafficking of cocaine. This information is certainly not so lacking in probable cause that the federal officials could believe it unreasonable.[4] Likewise, the search of Morris's ranch was based on information from Ahluwalia that he had been to this ranch and that Morris ran his drug operation from this location. This information clearly is sufficient indicia of probable cause to render official belief in its existence reasonable. Because the good faith exception to the exclusionary rule applies, we need not reach the question of probable cause. Webster, 960 F.2d at 1307. We therefore conclude that the district court did not err is rejecting Morris's motion to suppress and admitting into evidence material obtained pursuant to the two federal search warrants.

[4]Even without the observation of the state officers, the federal officers' reliance upon the warrants was objectively reasonable. For this reason, and because it appears the state search warrant was based upon probable cause, we reach no conclusion on whether the good faith rule extends to a situation where evidence obtained in an earlier unconstitutional search becomes the predicate for another warrant.

C

Morris also argues that venue and jurisdiction were not established in the Northern District of Texas because the actual transaction took place in the Southern District of Texas. The arrangements for the cocaine purchase were made in the Northern District, however, and a continuing offense can be prosecuted in any district in which it was begun, continued, or completed. 18 U.S.C. § 3237(a). A continuous offense is defined as "a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." United States v. Davis, 666 F.2d 195, 199 n.5 (5th Cir. 1982). Because the arrangements for the purchase were made in the Northern District of Texas, venue and jurisdiction were established there. Morris's argument therefore has no merit.

D

Morris further argues that the evidence in the record indicating that he affected interstate commerce is insufficient to support his conviction for money laundering.[5] In considering a sufficiency of the evidence challenge, this court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the government. United

[5]Morris was convicted under 18 U.S.C. § 1956(a)(1), for knowingly using the proceeds of an unlawful activity to conduct a financial transaction. A "financial transaction" is one which involves "the movement of funds by wire or other means . . . which in any way or degree affects interstate or foreign commerce." 18 U.S.C. § 1956(c)(4).

States v. Prieto-Tejas, 779 F.2d 1098, 1101 (5th Cir. 1986). The standard of review is whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). This court has held that drug trafficking affects interstate commerce, and "[t]he proceeds of drug trafficking have a similar effect." United States v. Gallo, 927 F.2d 815, 823 (5th Cir. 1991). In the case sub judice, it is clear that the money Morris used in connection with the drug transaction he entered into with Ahluwalia and Sharma was money gleaned from drug trafficking; Morris actually told Ahluwalia that the money he was using to purchase the cocaine was the proceeds of prior drug sales. Morris's use of the proceeds of drug trafficking to purchase additional drugs does affect interstate commerce because the local distribution and possession of drugs, while not an integral part of the interstate flow, "nonetheless have a substantial and direct effect upon interstate commerce. . . ." Id. (quoting 21 U.S.C. § 801(3)). We therefore conclude that there is sufficient evidence to sustain Morris's money laundering conviction.

IV

A

We next address Banks's arguments concerning the guilt phase of his trial. Banks first challenges the admission into evidence of his subsequent use of cocaine while on pretrial release. The

trial court maintains broad discretion over the admissibility of evidence, including its relevance, probative value, and prejudicial effect. United States v. Parziale, 947 F.2d 123, 129 (5th Cir. 1991), cert. denied, --U.S.--, 112 S.Ct. 1499, 117 L.Ed.2d 638 (1992). A district court's ruling on admissibility will not be reversed on appeal absent an abuse of discretion. Id.

B

At trial, witnesses testified as to Banks's reputation for honesty and integrity. On cross-examination of Banks, the prosecutor asked Banks if he had anything at all to do with narcotics. Following an objection by Banks's counsel, Banks admitted outside the presence of the jury that he had used cocaine while on pretrial supervision. The government sought to introduce the results of a urine test that showed Banks's use of cocaine for the purpose of demonstrating intent and Banks's state of mind. The government also alleged that Banks had put his character into issue and this evidence could therefore be introduced for rebuttal purposes. The district court admitted the evidence with a limiting instruction.

Rule 404(a)(1) of the Federal Rules of Evidence provides that evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except if it is offered by the accused or by the prosecution to rebut. Rule 404(a)(1) thus allows an accused to introduce evidence on a pertinent trait of his

character to defend against a criminal charge, and then permits the prosecution to rebut such evidence once the accused has presented it. Carson v. Polley, 689 F.2d 562, 576 (5th Cir. 1982).

Banks introduced witnesses in his own behalf who testified concerning his reputation for honesty and integrity. By doing so, Banks was attempting to attest to his own good character and negate any inference that he had the requisite criminal intent. As such, Banks clearly put his character into issue. Banks thus opened the door for the government to introduce evidence to rebut these claims of his good character. As a condition of his release pending trial, Banks promised that he would refrain from the unlawful possession of controlled substances. Evidence that Banks had breached this agreement was therefore admissible under rule 404(a)(1) to rebut Banks's testimony regarding his character traits of honesty and integrity. A violation of this agreement with the government rebuts his own evidence concerning his character traits of honesty and integrity. Accordingly, the district court did not err in allowing the introduction of this evidence. Because the evidence was admissible under rule 404(a)(1), we need not address whether it was admissible under rule 404(b) to show intent.

C

Banks next argues that the district court erred in denying his special requested jury instruction concerning lack of flight. We review a district court's refusal to give a particular instruction only for abuse of discretion. United States v. Terrazas-Carrasco,

861 F.2d 93, 95 (5th Cir. 1988). Banks submitted to the district court a requested jury instruction that despite having knowledge of the arrests of Morris, Sharma, and Ahluwalia, he did not flee the jurisdiction but remained in Houston up to and after the time of his arrest. Banks argues that an instruction on lack of flight is the converse of a jury charge to the effect that evidence of flight can be considered consciousness of guilt.

We conclude that it was not an abuse of discretion for the trial court to refuse Banks's requested jury instruction regarding lack of flight.[6] Banks argues that his lack of flight was evidence from which a jury could infer lack of guilt. It may well be a plausible inference under certain designated circumstances that one does not flee because one is not guilty and thus there is no fear of arrest or conviction. This general proposition does not, however, mean that it was error to fail to give the instruction in this case. Banks's lack of flight could have been for any number of other reasons that have no bearing on a conscious state of mind reflecting innocence. For instance, Banks operated a successful business in Houston, and he had friends and family there; he may well have chosen to remain in Houston for these reasons. Furthermore, Banks was not arrested until months after the arrest

[6]Both the Eighth and Ninth Circuits have upheld the denial of such an instruction after refusing to recognize "lack of flight" as a defensive theory on which there should be a jury instruction. See United States v. McQuarry, 726 F.2d 401 (8th Cir. 1984); United States v. Scott, 446 F.2d 509 (9th Cir. 1971).

of Morris, and his decision not to flee may well have been based on his fear that flight would be a sign of his guilt. It is also possible that Banks was aware that evidence of an attempted flight could be used by a jury to infer guilt, and this was his reason for not fleeing. Obviously, there are numerous reasons other than lack of guilt to explain Banks's lack of flight; we therefore cannot say that he showed that his lack of flight was so probative of his innocence that the district court abused its discretion in refusing to give this instruction. Furthermore, even if this denial had been error, it would have been harmless in the light of the evidence against Banks. See United States v. Barnhart, 889 F.2d 1374, 1379 (5th Cir. 1989), cert. denied, 494 U.S. 1008 (1990).

D

Banks also argues that the government violated its use of peremptory challenges when it excluded two prospective black jurors. A prosecutor violates the equal protection clause if he exercises his peremptory challenges to exclude prospective jurors because of their race. Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986). Because the issues presented in a Batson challenge turn on an evaluation of credibility, we review the district court's findings under the clearly erroneous standard. Terrazas-Carrasco, 861 F.2d at 94. Although Banks met his burden to demonstrate a prima facie case of discrimination, the prosecutor articulated legitimate reasons the jurors were excluded. One prospective juror was excluded because

he was about the same age as one of the defendants, wore an earring, and had difficulty following the court's instructions. A second prospective juror was excluded because she avoided eye contact with the prosecution table but made eye contact with the defense table.

This court has previously stated that the reasons for the exercise of a peremptory challenge need not be quantifiable and may include intuitive assumptions about potential jurors. United States v. De La Rosa, 911 F.2d 985, 991 (5th Cir. 1990), cert. denied, __U.S.__, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991). The prosecutor articulated race-neutral reasons for exercising his peremptory challenges. The district court therefore did not err in concluding that the prosecutor had not improperly used his peremptory challenges.

V

A

We now turn to Morris's and Banks's arguments concerning their sentences. Both Morris and Banks challenge the district court's application of the sentencing guidelines and argue that the amount of cocaine determined to have been involved in this transaction was incorrect. The district court's finding about the quantity of drugs implicated by the crime are factual findings. United States v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989). In making its findings, the district court may consider a variety of evidence and is not limited to amounts seized or specified in the indictment.

Id. Findings of fact that underlie the district court's sentence are reviewed under the clearly erroneous standard. 18 U.S.C. § 3742(d); United States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir.), cert. denied, 492 U.S. 924 (1989). Once the district court has made factual findings, the court's sentence will be affirmed if it results from a proper application of the sentencing guidelines to those facts. Id. at 219.

Morris and Banks both argue that the district court erred in concluding that the amount of cocaine involved in the conspiracy was twenty-five kilograms instead of ten kilograms. Banks also argues that the extra fifteen kilograms of cocaine should not be included in determining his base offense level because it was not reasonably foreseeable to him.[7] Ahluwalia testified that Morris told Sharma that after the initial ten kilogram transaction, the purchasers were ready to buy another fifteen kilograms of cocaine. The confidential informant testified that when Ahluwalia showed him the money for the initial purchase, Ahluwalia said he wanted to purchase ten kilograms now and fifteen later, for a total of twenty-five kilograms. One of the undercover agents also testified that the transaction included a ten kilogram deal to be followed shortly thereafter by a fifteen kilogram deal. The district court therefore concluded that there was a fifteen kilogram transaction

[7]Under Application Note 1 to section 1B1.3 of the sentencing guidelines, where a defendant acts in concert with others the court must calculate the offense level of each defendant based upon criminal activity that was reasonably foreseeable.

contemplated after the initial ten kilogram transaction. This finding is not clearly erroneous.

The district court has wide discretion in evaluating the reliability of the information and whether to consider it. United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, __U.S.__, 112 S.Ct. 1677, 118 L.Ed.2d 394 (1992). The sworn testimony of three witnesses is clearly sufficient indicia of reliability to support the district court's finding that the conspiracy for which Morris and Banks were convicted involved twenty-five kilograms of cocaine. Furthermore, Banks worked closely with Morris to carry out the transaction and knew that Morris had an extensive drug operation. The district court could therefore conclude that Banks knew the extent of the conspiracy and the amount of cocaine negotiated for sale. Accordingly, the district court did not err in determining the weight of the cocaine as twenty-five kilograms to calculate the base offense level for Morris and Banks.[8]

B

Morris challenges two other aspects of his sentence. First, Morris argues that the district court erred in adjusting his

[8]Morris and Banks also suggest that in a "reverse sting," i.e., one in which the government provides the illegal substance, reliance upon cocaine weight to calculate the offense level is unfair because undercover officers dictate the terms of the sale and therefore determine the offense level. The sentencing guidelines, however, draw no distinction between a defendant as seller and a defendant as purchaser. As such, this challenge has no merit under the specific facts of this case.

offense level up two levels for obstruction of justice pursuant to section 3C1.1 of the sentencing guidelines. The district court's finding that Morris obstructed justice is reviewed under the clearly erroneous standard. United States v. Pierce, 893 F.2d 669, 677 (5th Cir. 1990). The district court concluded that Morris had attempted to obstruct justice because he told Ahluwalia not to cooperate in the investigation by staying quiet, and that he wanted the confidential informant found so he could get back at him. Furthermore, Morris misrepresented his place of residence. These statements clearly indicate that Morris attempted to influence one witness to be uncooperative and attempted to threaten or endanger another potential witness. The district court did not err in concluding that Morris had attempted to obstruct justice and in enhancing his offense level.

Second, Morris argues that the district court erred in making an upward adjustment of four levels for his being an organizer or leader pursuant to section 3B1.1(a) because there were not five or more criminally responsible persons who were claimed to be part of his alleged organization. Whether Morris is an organizer or leader in a criminal activity may be deduced inferentially. United States v. Manthei, 913 F.2d 1130, 1135 (5th Cir. 1990). Furthermore, the identities of the participants need not be expressly proved. United States v. Barbontin, 907 F.2d 1494, 1498 (5th Cir. 1990). The district court concluded that five or more persons were

involved in this conspiracy.[9] In this conclusion the district court did not err. An upward adjustment for Morris's being an organizer or leader was therefore appropriate.

C

Banks also challenges another aspect of his sentence. Banks argues that the district court erred by not reducing his offense level by two levels pursuant to section 3B1.2(b) of the sentencing guidelines because he was a minor participant.[10] The district court concluded that Banks was not a minor participant. This is a factual determination that must be upheld unless clearly erroneous. United States v. Lokey, 945 F.2d 825, 840 (5th Cir. 1991). Banks was the middleman between Morris and Ahluwalia. It was Banks who introduced Ahluwalia to Morris. Banks transported a sample of heroin from Houston to Dallas and gave it to Morris to show Morris that Sharma was serious about making a deal. In addition, Banks helped to deliver the $175,000 for the transaction between Morris and Ahluwalia. These factors reasonably lead to the conclusion

[9]The government included as participants Morris, Ahluwalia, Banks, Sharma, Malone, the unknown male who took the sample of heroin from Morris, an unknown female who accompanied Morris to Houston, other female couriers, and an unknown Louisiana buyer. The district court further found that Morris's organization was extensive because of the T-shirts depicting the areas Morris said he controlled. Morris argues that Malone should not be included as a participant because he was acquitted of conspiracy charges. We need not address this issue, however, because even without Malone there were five or more participants.

[10]A minor participant is one who is less culpable than most other participants. U.S.S.G. § 3B1.2, Application Note 3.

that Banks was not a minor participant. As such, the district court did not err in refusing to decrease Banks's offense level.

VII

We conclude that the district court did not err in admitting evidence against Morris obtained pursuant to two federal search warrants. Furthermore, the district court did not err in admitting evidence of Banks's use of cocaine while on pretrial release. We also find that the district court did not err in applying the sentencing guidelines to Morris and Banks. We further hold that all other arguments raised on appeal are without merit. Accordingly, we affirm the conviction as well as the sentencing of Morris and Banks.

A F F I R M E D.