UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2540
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILSON ALFREDO ANDRADE
a/k/a ALFREDO VICTOR,

Defendant-Appellant.

****

No. 92-2541
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JORGE IGNACIO PALOMO a/k/a
JORGE IGNACIO PALOMO-NAJARO

Defendant-Appellant.

****

No. 92-2543
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE IGNACIO PALOMO a/k/a
JOSE IGNACIO PALOMO-BETETA

Defendant-Appellant.

****

No. 92-2672

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARK TULIO MANCILLA,
a/k/a
MARCO TULIO MANCILLA-MANCHAME,

Defendant-Appellant.

Appeals from the United States District Court
For the Southern District of Texas

(CR H 91 165 4, CR H 91 165 2, CR H 91 165 01 & CR H 91 0165 09)

(October 22, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM: *

BACKGROUND

A federal grand jury in Houston charged appellants Jose Ignacio Palomo (Jose), Jorge Ignacio Palomo (Jorge), Wilson Alfredo Andrade (Andrade), and Marco Tulio Mancilla (Mancilla), as well as ten other individuals, with conspiring to possess with intent to distribute more than five kilograms of cocaine (Count 1) and aiding and abetting possession of more than five kilograms of cocaine (Count 2). All four appellants pleaded guilty to Count 1, Count 2 was dismissed as to all four, and they received the following prison sentences: Jose, life; Jorge, 360 months; Andrade, 151 months; and Mancilla, 121 months.

Co-defendant Edgar Rolando Palomo (Edgar) also pleaded guilty, and he was sentenced to serve 262 months imprisonment, later reduced to 202 months. This Court affirmed Edgar's conviction and sentence in a published opinion. United States v. Palomo, 998 F.2d 253, 255-56, 258 (5th Cir. 1993) (Edgar Palomo). Co-defendant Rene Agusto Rodriguez pleaded guilty and was sentenced to serve 151 months in prison. This Court affirmed Rodriguez's conviction and sentence in an unpublished opinion. United States v. Rodriguez,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

No. 92-2539, slip op. at 1 (5th Cir. Mar. 29, 1993) (copy enclosed).

Jose headed a cocaine smuggling organization that imported Colombian cocaine to Houston via Guatemala. Shipments arrived in Guatemala from Colombia by air, and Jose's Guatemala-based trucking company transported the drugs through Mexico to Houston. Rodriguez, No. 92-2539, slip op. at 2.

The operation used tractor-trailers and pickup trucks equipped with secret fuel tank compartments. The trucks were driven to Jose's mechanic shop in Houston and unloaded there. At the shop, the Drug Enforcement Administration (DEA) agents hid a video camera, which recorded the arrivals of the trucks. The camera also recorded conspirators cutting up empty gasoline tanks, unloading cocaine hidden in tanks, carrying packages of cocaine around the shop, and refitting the tanks. Id. at 2-3.

The DEA estimated that, between July and September 1991, Jose's organization imported approximately 227 kilograms of cocaine into the United States. Id. at 3. Agents seized 116 kilograms of cocaine during the execution of search warrants. Debriefings, intelligence sources, and related investigations revealed that an additional 111 kilograms had been transported during the course of the conspiracy. Edgar Palomo, 998 F.2d at 255.

Jorge, who is Jose's son, was in charge of the shop, which was located on Harwin Street in Houston. Edgar is another son of Jose. Edgar Palomo, 998 F.2d at 254.

Jorge participated in the opening of at least one hidden tank and the removal of cocaine from it. He delivered the cocaine to Andrade. Id. at 30.

Andrade received the cocaine from Jorge and delivered it to other co-conspirators. Mancilla worked in the shop and assisted Jorge in taking cocaine from at least one tank.

OPINION

"Substantial assistance" motions
(Jose, Jorge, Andrade, Mancilla)

As discussed below, each appellant argues that the Government breached his plea agreement by not filing a motion for downward departure pursuant to U.S.S.G. § 5K1.1 based on his substantial assistance. Edgar made the same argument. Edgar Palomo, 998 F.2d at 256.

With minor differences noted below, all defendants entered into plea agreements containing the same "substantial assistance" provision that appeared in Edgar's plea agreement, namely:

> The United States will file a motion for downward departure under Section 5K1 of the Sentencing Guidelines, should I provide substantial assistance.
>
> I understand that if I am called to testify before a Grand Jury or a trial jury concerning this information that I must not only tell the complete truth concerning any question I am asked, but I must not withhold any evidence that may relate to the guilt or innocence of any other person. I know that my response to all questions whether they be by the Assistant United States Attorney, the Defense attorney or the U.S. District Judge must be the truth.

Andrade's agreement, instead of referring to "the complete truth concerning any question I am asked," reads, "the complete truth concerning this question I am asked." (Emphasis added).

Mancilla's agreement is identical to the quotation above, except that inserted between the two paragraphs is a statement of the Government's agreement that Mancilla's role in the offense was minimal. No one mentions these differences.

Explanations of the Agreements

Jose and Jorge. Jose and Jorge appeared together for their guilty plea hearing on February 5, 1992. The court paraphrased the "substantial assistance" provision quoted above. Jose said that he understood it. So did Jorge. The Assistant United States Attorney (AUSA) told the court that the Government agreed not to ask Jose and Jorge to testify against members of their own family. The court incorporated that modification into its explanation of the plea agreement.

Concerning the "substantial assistance" provision, the court told Jose and Jorge, "I need to tell you several things about that. First of all, it's up to the Government to decide whether to file that recommendation. And if the Government doesn't move for downward departure, I can't do anything about it. You understand that?" Both said that they did.

"Furthermore," stated the court, "do you understand that if the Government does move for downward departure, Section 5(K)(1.1) of the Guidelines, requires that I make an evaluation of the significance and usefulness of your assistance. After taking into consideration the Government's evaluation. In other words, even if the Government moves for downward departure, I don't have to agree with the Government. Do you understand that?" Both said yes. They

both also said that they understood that if they did not testify truthfully and completely, the Government would not dismiss the aiding and abetting count.

Andrade. At Andrade's guilty plea hearing on February 18, 1992, the court read through the plea agreement with him, including the "substantial assistance" provision quoted above. The court then told Andrade, "Normally, I cannot depart below a statutory minimum, in this case ten years. In this case, however, the Government has said that if you provide substantial cooperation, it will file a motion to depart under Section 5K1 of the guidelines. What I want you to understand is, it's up to the Government to determine whether you have cooperated and whether to file that departure motion."

After Andrade said that he understood, the court continued, "Do you further understand that even if the Government thinks you've cooperated and files the motion, I must also determine that you have, in fact, cooperated and provided substantial assistance to the Government." Andrade said that he understood. Later, Andrade's counsel stated, "It's sort of an option whether or not [Andrade] will cooperate and the Government will file the 5K."

The court also stated, "[I]f the Defendant provides substantial cooperation, the Government may, but is not obligated to, file a motion under Section 5K1.1 for downward departure." The AUSA agreed that the court interpreted the provision correctly; the defense did not object.

Mancilla. At Mancilla's guilty plea hearing on February 12, 1992, the court recited portions of his plea agreement, including the "substantial assistance" provision quoted above. Mancilla acknowledged his understanding. The judge also told Mancilla that, even if the Government were to file a 5K1.1 motion, "I'm not obligated to go along with that recommendation unless I find that you have in fact rendered substantial assistance to the Government and have in fact cooperated." Mancilla said that he understood.

Sentencings Without 5K1.1 Motions

At one hearing on July 2, 1992, the court sentenced several of the co-conspirators, including Jose, Jorge, and Andrade. Mancilla was sentenced three weeks later.

Jose. Jose was sentenced first. No one mentioned the 5K1.1 motion.

Jorge. Jorge's counsel opened his client's portion of the sentencing hearing by complaining that Jorge had been debriefed so long after his guilty plea that the information had no substantial value to the Government. The AUSA responded that DEA Agent Finece had debriefed Jorge twice but "there was no substantial assistance, there's never been any substantial assistance."

Finece's testimony. Finece was called to testify. He interviewed Jorge twice, with Jose present at one of the meetings. Jose and Jorge pointed out to Finece a place on a map where they said cocaine was stored. An agent attempted to find such a place without success.

Finece also asked Jose the location of cocaine that was delivered by another co-conspirator. Jose made telephone calls but apparently provided no further information.

Finece then heard through jailhouse sources that the Palomos did not wish to talk any further. When Jose's and Jorge's lawyers asked Finece to interview their clients again, Finece did, approximately ten days before sentencing, but apparently without gaining any useful information.

Before debriefing, Finece told Jose and Jorge that cooperation in four areas would be considered substantial assistance. The areas are (1) testifying in court, (2) providing substantial evidence in future cases, (3) assisting in the apprehension of fugitive co-conspirators, and (4) assisting in the arrest of anyone else who was involved in their operation.

Jorge did identify to Finece several people whom officials believed were involved in transporting cocaine. Finece obtained that information from Jorge by showing him photographs of the suspects, and Jorge confirmed that they were involved with shipments of cocaine. Jorge agreed to testify against them if the Government were to arrest and indict them. Finece opined that testifying against those individuals would constitute substantial assistance. Finece told Jorge that, if he did so testify after sentencing, the Government would file a motion for reduction of his sentence pursuant to Fed. R. Crim. P. 35(b). One of the identified individuals was apprehended in the week of sentencing.

Court's finding. Jorge's counsel moved for a postponement of sentencing to evaluate the importance of that apprehension. The court responded:

> No. This sentencing has been set for months and I'm not going to delay it any further. If, in fact, Jorge Ignacio Palomo or any other Defendant provides information, the Government, in it's [sic] discretion, can move under Rule 35 to reduce the sentence. I'm not going to delay this sentencing at this time. I don't find any indication that the Government has acted in bad faith in not moving to depart downward under Section 5(K)1.1.

This Court has already held that the district court's finding of no bad faith was not clearly erroneous. Edgar Palomo, 998 F.2d at 256-57. This Court extended the finding to include the Government's conduct toward Edgar, who was sentenced at the same hearing immediately after Jorge. Id.

Andrade. At Andrade's portion of the sentencing hearing, the court noted that it had received a written statement from Andrade. Andrade's attorney had not seen it before the court mentioned it. The statement's contents are not in the record.

The court said that the statement would be liberally construed as a motion to withdraw the plea, which was denied. Nothing indicates whether the liberally construed motion related to the omitted 5K1.1 motion.

During Andrade's portion of the hearing, no one mentioned cooperation until the court sua sponte told Andrade, "And, let me say Mr. Andrade, if you think you have information that will be cooperative--would help the Government, you heard what Agent Finece said. Other defendants have been and may be granted departure in

their sentences under Rule 5K1 or Rule 35. I encourage you to cooperate. Do either counsel have anything else?" Andrade's counsel did not address the 5K1 motion.

Mancilla. Mancilla's sentencing was on July 23, 1992. No one mentioned a 5K1.1 motion.

Arguments and Analysis

In the district court, Edgar objected to the Government's omission to file a 5K1.1 motion, but he did not move to withdraw his plea. Edgar Palomo, 998 F.2d at 256. Accordingly, his argument that the Government breached the plea agreement by not filing the 5K1.1 motion was reviewed for plain error.

Jose's, Jorge's, and Mancilla's breach arguments likewise should be reviewed for plain error because they did not move to withdraw their pleas. When an objection is forfeited in the district court, the Court of Appeals may correct an error that both is plain and affects a party's substantial rights. United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993). An error is plain when it is clear or obvious. To show that a substantial right is affected, a party normally must show prejudice. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." While the language of the rule is permissive, a Court of Appeals should correct a plain error that seriously affects the "fairness, integrity or public reputation of judicial proceedings." Id. (internal quotation not indicated).

As to Andrade, the Court does not know whether his motion to withdraw related to the alleged breach because the motion is not in the record. As the result is the same without the plain error standard, as discussed below, the contents of the motion are not essential to this appeal.

The remedy for the Government's breach is either specific performance or the withdrawal of the plea with the opportunity to plead anew. Edgar Palomo, 998 F.2d at 256. Analysis of a claimed breach is a matter of law, based on whether the Government acted consistently with the defendant's reasonable understanding of the agreement. Id. The defendant has the burden to prove the underlying facts amounting to a breach by a preponderance of the evidence. Id. Being ready and willing to cooperate may constitute "substantial assistance." Id.

Jose. Jose argues that the Government did not give him an adequate opportunity to provide information and did not investigate the information that he did provide. Finece testified that information that Jose provided about the location of cocaine was checked out and it was inaccurate. Jose has not shown how the Government's one or two interviews with him, which the Government found futile, were inconsistent with a reasonable understanding of the plea agreement. Additionally, the implicit finding that the Government provided Jorge an adequate opportunity to provide substantial assistance, which this Court extended to Edgar, could also be extended to Jose because he was present for at least one of the meetings between Finece and Jorge.

Jorge. Jorge argues that he told the Government about other individuals and shipments of cocaine, that he stood ready to testify for the Government but was not asked to do so, and that the Government wanted him to provide information that he did not have. Jorge has not shown how the Government's conduct, in light of the useless information about the location of cocaine, was inconsistent with a reasonable understanding of the plea agreement. Furthermore, the district court implicitly found no breach, and this Court has already held that finding not clearly erroneous.

Andrade. Andrade argues that he did provide substantial assistance, that the plea agreement obligated the Government to file the 5K1.1 motion upon his provision of substantial assistance, and that perhaps a change in AUSAs between the guilty plea hearing and the sentencing hearing accounts for an inadvertence by the Government to file the 5K1.1 motion.

Andrade told the district court that he had provided information and that he would ratify it in court. The court responded that Andrade could be subject to a motion for reduction of sentence if he were to cooperate; the court encouraged him to do so.

The district court apparently believed that Andrade had not yet provided substantial assistance. Nothing in the record indicates that the information that Andrade did provide constituted substantial assistance. With no details in the record that would indicate the extent of a defendant's cooperation, this Court has no way to hold that sentencing without a 5K1.1 motion is erroneous.

United States v. Paden, 908 F.2d 1229, 1234 (5th Cir. 1990), cert. denied, 498 U.S. 1039 (1991). The district court did not err in implicitly finding that the Government had not breached the plea agreement.

Mancilla. Mancilla argues that the promise to file a 5K1.1 motion was an integral part of the plea agreement upon which he relied. He asserts that, because he stood ready to give testimony for the Government, its failure to call him to testify was the cause for his omission to provide substantial assistance. Accordingly, he argues, the Government breached the plea agreement and should be required to specifically perform, i.e., the Government should be ordered to file the 5K1.1 motion.

At the sentencing hearing for the other defendants, Finece said that Mancilla agreed to testify. Finece did not testify at Mancilla's sentencing hearing.

In his objections to the Presentence Report (PSR), Mancilla wrote, "Defendant has been debriefed by the Government. He was debriefed and provided the Government with all the available information that he was personally aware of. Defendant's plea resulted on [sic?] majority of other defendant's [sic?] pleading. Defendant expects the government to make a Motion for Downward Departure, otherwise an evidentiary hearing may be necessary."

Other than these conclusions stated in Mancilla's objections to the PSR, nothing in the record indicates whether Mancilla provided any assistance at all. Proceeding with sentencing without a 5K1.1 motion was not plain error.

Firearms
(Jose, Jorge, Andrade)

As discussed below, Jose, Jorge, and Andrade argue that their offense levels were improperly increased for the presence of firearms. An offense level should be increased by two points "[i]f a dangerous weapon (including a firearm) was possessed" during a drug trafficking crime. U.S.S.G. § 2D1.1(b)(1). "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, comment. (n.3). The adjustment is applicable even if the defendant did not use or intend to use the weapon or if the weapon was unloaded or inoperable. United States v. Paulk, 917 F.2d 879, 882 (5th Cir. 1990).

The Government may show possession by proving either a temporal and spatial relationship among the weapon, the offense, and the defendant or that the defendant could have reasonably foreseen such possession by a co-defendant. Foreseeability may be inferred from the co-defendant's knowing possession of the weapon and other circumstances. United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991). The district court's finding is reviewed for clear error. United States v. Suarez, 911 F.2d 1016, 1018-19 (5th Cir. 1990).

Jose. Jose argues that his sentence was improperly increased for the presence of a weapon. The increase was improper, he argues, because, although he owned the house in which guns were

found, his daughter Nora--not he--lived in the house[1] and because the AUSA who was originally assigned to the case had agreed that no gun was used in the offense. No other gun connected to him was found, he asserts.

Jose also argues that he did not possess the guns personally and his daughter's possession was not foreseeable. Jose also argues that he did not attempt to show the clear improbability of a connection between the guns and his offense because he relied on the AUSA's stipulation that no gun was used in the offense.

Jose owned a house at 12011 Newbrook in Houston. The telephone was in his name, but his daughter Nora, who also was a co-conspirator, lived there. Jose, however, kept cash secreted there and distributed it from there. Agents found in the house several weapons and ammunition, as well as more than $200,000 cash. The probation officer recommended a two-level increase for the presence of firearms at the Newbrook house. Jose objected to the increase. The court overruled the objection, finding Jose's possession of weapons to have been both personal and through the co-conspirators.

The record contains scant support for Jose's argument that he did not make the "clearly improbable" showing because the AUSA had agreed that weapons were not used. The AUSA's agreement is not in the record. In his objections to the PSR, Jose alleged that the

[1]Jose's brief refers to the person living in the house as his wife. The person who actually lived in the house is his daughter, Nora.

AUSA had told him that weapons were not used. Jose argues, "The Government did not contradict this assertion . . . ."

The Government's omission to contradict Jose's objection does not make his allegation true. The inclusion of the two-level increase in the PSR certainly put Jose on notice that a showing would be required to defeat the recommended increase.

Given the evidence and the burden on the defendant to show a clear improbability of connection between the guns and the drug offense, the district court's overruling of the objection is not clear error. Moreover, in a drug conspiracy involving the large number of people, the enormous quantity of cocaine, and the vast distances involved here, a conspirator cannot credibly argue that he could not have foreseen possession of a weapon by a co-conspirator. "Weapons and violence are frequently associated with drug transactions, of course." United States v. Coleman, 969 F.2d 126, 132 n.20 (5th Cir. 1992).

Jorge. argues that he should not have been assessed the increase merely because weapons were found at his house, in front of which was parked a vehicle containing cocaine. Jorge argues that this was merely "a one time occurrence," and that, because the record does not show that weapons were found at the shop, the increase was improper.

A truck parked in the driveway of Jorge's residence contained 24 kilograms of cocaine. Inside, agents found several firearms with ammunition. The probation officer recommended a two-level increase. Jorge objected. The district court overruled the

objection, finding possession both directly and through the co-conspirators. For the reasons discussed above with respect to Jose, this finding is not clearly erroneous.

Andrade. Andrade argues that a weapon found in a house on Rio del Sol in Houston had nothing to do with him, that he was not arrested at the house, and that he possessed no weapon personally. He also argues that the district court made no finding on the identity of the person who owned the weapon, precluding a determination that he possessed it through co-conspirators.

On several occasions, Andrade went to a house at 15614 Rio del Sol, where co-conspirators lived, to meet them and transport cocaine. Agents found at that house one kilogram of cocaine, $11,000 cash, two loaded firearms, and documents belonging to Andrade. Andrade said that he was not aware that guns were present. The probation officer recommended a two-level increase. Andrade objected.

The court overruled the objection, finding Andrade responsible for the weapon both personally and through his co-conspirators. The court stated that it understood that Andrade had a limited connection to the house and that the justification for the increase rested particularly on Andrade's responsibility for the weapon through his co-conspirators. For the reasons discussed above with respect to Jose, this finding is not clearly erroneous.

Acceptance of responsibility
(Jose, Jorge)

As explained below, Jose and Jorge argue that they were improperly denied reductions in offense level for acceptance of

responsibility. A defendant is entitled to a two-level reduction when he "clearly demonstrates a recognition and affirmative acceptance of personal responsibility." U.S.S.G. § 3E1.1(a). The defendant has the burden of making such a demonstration. United States v. Mourning, 914 F.2d 699, 705-06 (5th Cir. 1990). The district court's determination is a factual one that is "entitled to great deference on review." U.S.S.G. § 3E1.1, comment. (n.5); United States v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989).

Jose. Jose argues that he should have received the reduction. While acknowledging that the burden is his to prove acceptance of responsibility, he argues that the AUSA's stipulation that he did accept responsibility is sufficient.

Jose's plea agreement provides, "The United States will stipulate that I have accepted responsibility for my actions . . . ." The probation officer recommended against the reduction because Jose minimized his involvement and did not make the required affirmative demonstration. The probation officer reported that Jose told him that three other conspirators, and not he, led the conspiracy. Jose is also reported to have told the probation officer that he was unaware of the cash in the Newbrook house until his arrest. Jose objected.

The district court denied the reduction, stating that Jose "flat out lied," observing that Jose denied responsibility for the transactions at the house where Nora lived, yet he kept large amounts of cash there. Given the PSR's account of Jose's statement, the finding is not clearly erroneous.

Because of the stipulation, Jose argues, "[T]his issue was not one disputed by the Government. Since it was not an issue between the parties, the Court's abrogation [sic] what was an implicit part of the plea bargain, and [sic] denied Appellant credit for the two points."

In the plea agreement, however, Jose acknowledged that the Court could assess any lawful sentence, including the maximum penalty. At the guilty plea hearing, the court referred to the Government's stipulation and stated to Jose, "Do you understand that just because the Government stipulates to that, I am not bound to find that you have accepted responsibility?" Jose said yes. Furthermore, a district court is not bound by stipulations recited in a plea agreement. U.S.S.G. § 6B1.4(d); United States v. Woods, 907 F.2d 1540, 1542 (5th Cir. 1990), cert. denied, 498 U.S. 1070 (1991).

Jorge. Jorge argues that he was improperly denied the reduction because the district court did not consider that he admitted his participation in the offense. He also makes the same argument about the Government's stipulation that Jose raised.

Jorge's PSR recommended against the adjustment. The probation officer reported that Jorge attempted to distance himself from the conspiracy, claiming only to have helped two conspirators open one tank on one day. Jorge objected. The district court overruled the objection, finding that Jorge was more involved in the offense than he told the probation officer he was.

Jorge did unload one tank, but he also managed the shop on Harwin for Jose, supervised activities there, and himself delivered to Andrade the cocaine that he removed from one tank. He acknowledged in court that he unloaded that one tank in furtherance of the conspiracy. The mere assertion that the court did not consider that he admitted his participation in the offense, however, does not bear the weight of Jorge's burden to show acceptance of responsibility. Furthermore, a defendant's unwillingness to accept responsibility for any portion of his applicable conduct is grounds for denying the adjustment. United States v. Watson, 988 F.2d 544, 551 (5th Cir. 1993), petition for cert. filed, No. 93-5407 (July 29, 1993). The district court's finding is not clearly erroneous.

Jorge's plea agreement does contain the same stipulation as Jose's. It also contains the same acknowledgment that the sentence is within the discretion of the court. At the guilty plea hearing, Jorge stated his understanding of the same admonition that the court was not bound by the stipulation. For the reasons stated with respect to Jose, this argument is meritless.

Obstruction of justice
(Jose)

Jose argues that he should not have received an increase for obstruction of justice. A two-level increase is warranted when a defendant obstructs justice. U.S.S.G. § 3C1.1; United States v. Pofahl, 990 F.2d 1456, 1481 (5th Cir. 1993), petition for cert. filed, No. 93-5526 (Aug. 4, 1993). A district court's finding of obstructive conduct is reviewed for clear error. Id.

The probation officer reported that testimony at the trial of a co-conspirator, Eduardo Hernandez, who is Jose's grandson, revealed that Jose had urged the grandson to flee and not appear for trial. The probation officer also reported that Jose urged other co-conspirators to provide misleading information to the probation officer. The PSR recommended a two-level increase for obstruction of justice. Jose objected.

At sentencing, the court called Hernandez to testify. He testified that his grandmother told him that his grandfather wanted him to flee to avoid having to serve time in prison. Immediately following the testimony, the district court overruled Jose's objection to the increase.

Flight to avoid prosecution qualifies as obstructive conduct. Pofahl, 990 F.2d at 1882. Counseling another to obstruct justice is also obstructive. U.S.S.G. § 3C1.1, comment. (n.7). The district court's finding that Jose obstructed justice is not clearly erroneous.

Jose, however, argues that the testimony was double hearsay. Hearsay, though, may be used for sentencing; the district court may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy," including hearsay. U.S.S.G. § 6A1.3, comment.; United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990). The PSR itself also bears such indicia. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990).

The district court heard live testimony, overruling counsel's objection to the admission of hearsay. Counsel examined Hernandez.

Counsel did not attempt to impugn the reliability of the testimony. Furthermore, the facts were also stated in the PSR. Jose has not shown this Court how the evidence does not bear sufficient indicia of reliability to support its probable accuracy.

Quantity of cocaine
(Jose)

Jose argues that the quantity of cocaine used for sentencing was too large. He argues that the amount should have been that which was actually seized, not an estimate of the total amount of cocaine involved in the conspiracy. The district court found that the conspiracy involved 227 kilograms of cocaine. This Court has already held that finding not clearly erroneous. Edgar Palomo, 998 F.2d at 258.[2]

For sentencing purposes, a conspirator is held accountable for all reasonably foreseeable acts of his co-conspirators. U.S.S.G. § 1B1.3(a)(1)(B) & comment. (n.2); United States v. Devine, 934 F.2d 1325, 1337 (5th Cir. 1991), cert. denied, 112 S. Ct. 349 (1991), and cert. denied, 112 S. Ct. 952 (1992). Jose is liable for the 227 kilograms.

Leadership role
(Jorge)

Jorge argues that his offense level was improperly increased by two levels for his having a leadership role in the offense. A two-level increase is warranted when a defendant was an organizer,

[2]The district court actually stated the amount as 226 kg., and this Court stated that it was 227 kg. No one argues that this discrepancy is significant. The base offense level is the same for amounts of at least 150 kg. but less than 500 kg. U.S.S.G. § 2D1.1(c)(3).

leader, manager, or supervisor in any criminal activity. U.S.S.G. § 3B1.1(c). Seven factors should be considered in making the leadership determination. They are "(1) the exercise of decision-making authority; (2) the nature of participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share of the fruits of the crime; (5) the degree of participation in planning and organizing the offense; (6) the nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others." U.S.S.G. § 3B1.1, comment. (n.3); Edgar Palomo, 958 F.2d at 257. The district court's determination is upheld unless clearly erroneous. Id.

The probation officer recommended the increase. He stated, "Jorge Palomo appeared to occupy a leadership role, but is viewed as less culpable than his brothers, Rafael and Edgar Palomo. He functioned primarily as a supervisor of the shop located at 9909 Harwin, No. D, Houston, Texas." The probation officer further determined that the increase was warranted because Jorge had "hired Marco Mancilla to cut open the gasoline tanks and dispose of the refuse." Jorge objected.

The district court overruled the objection, finding that Jorge played a leadership role because he was the supervisor at the shop. Jorge argues that there was no evidence to show that his supervisory duties at the shop meant that he was a supervisor of the criminal activity.

The probation officer reported that Jorge was the supervisor at the shop in Houston "where the `load' vehicles were brought and

the cocaine removed from the gasoline tanks. He hired Marco Mancilla to cut open the gasoline tanks and dispose of the refuse." Jorge also leased the premises for the shop. He once directed Hernandez to purchase black spray paint to conceal a gasoline tank's removal. Jorge once allowed another conspirator to use his truck to smuggle cocaine. His telephone number and residence were used by the conspirators to further the conspiracy.

Jorge does not appear to have exercised decision-making authority. He did supervise the shop, where the shipments from Guatemala arrived and were disassembled. He recruited one other accomplice. He claimed no larger share of the fruits. He does not appear to have been crucial in the planning and organizing, though he did once lend his own truck for transportation of the cocaine. The scope of the conspiracy was so broad that several persons could have occupied supervisory roles. The exact nature of Jorge's duties at the shop are not delineated, but he did supervise Mancilla. Jorge has not shown how these factors compel the conclusion that the district court clearly erred in finding him to have been a leader or organizer.

Suppression of evidence
(Andrade)

Andrade argues that evidence seized from a black Mazda truck that was following the car that he was driving at the time of his arrest should have been suppressed. Following a suppression hearing, the district court denied the motion to suppress.

The Government argues that Andrade entered an unconditional guilty plea, waiving the right to appeal the denial of the

suppression motion. Andrade did not anticipate this argument in his original brief, and he did not file a reply brief.

A defendant wishing to preserve a claim for appeal while still pleading guilty must enter a conditional plea. The plea must be in writing and must specify the determination intended for review. A conditional plea is not valid without the consent of the Government and the approval of the court. Fed. R. Crim. P. 11(a)(2); United States v. Bell, 966 F.2d 914, 915-16 (5th Cir. 1992). Andrade neither entered a conditional guilty plea nor bargained for one. This issue is waived.

We AFFIRM the convictions and sentences in each case.