IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5626

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT MARTINEZ-GILL and
CARLOS BARRERA HERNANDEZ, a/k/a
"Cale," BERNABE G. MALDONADO, and
MARTIN R. GUERRERO, JR.,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas
(SA-91-CR-318(4))

(July 7, 1994)

Before KING and SMITH, Circuit Judges, and KENT,[*] District Judge.

PER CURIAM:[**]

The four appellants were convicted of federal drug offenses after a jury trial. They now bring these direct appeals from their federal criminal convictions and sentences.

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[*]District Judge of the Southern District of Texas, sitting by designation.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.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

A. FACTS

We view the record in the light most favorable to the jury verdicts returned against the appellants in stating the facts of this case. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 500 U.S. 936 (1991).

The evidence tended to show the following. Martin R. Guerrero, Jr., was the owner or part owner of an "ice house" in San Antonio, Texas, called the Oasis Ice Station in 1989. He was a convicted felon on lifetime probation at the time, so he was barred by law from holding a license to sell liquor in Texas. Bernabe Maldonado, who was romantically involved with Guerrero's daughter, became the licensed owner of the Oasis in October 1989. Texas Alcoholic Beverage Commission records listed Carlos Hernandez as the manager of the Oasis.

1. *The Federal Investigation: Part One*

Between August 1989 and February 1990, Drug Enforcement Administration ("DEA") agents in New York and San Antonio conducted an undercover investigation focused on the fourth appellant, Robert Martinez-Gill. DEA agent Bryan Averi, who was working in New York, testified that a confidential informant who had been in prison with Martinez-Gill provided information to the DEA that he knew a person in San Antonio (Martinez-Gill) that could deliver Mexican heroin. The informant was sent to San Antonio to put Martinez-Gill in touch with Averi. He succeeded, and the DEA recorded numerous telephone conversations between

Martinez-Gill and Averi and between Martinez-Gill and the informant. In one conversation between Averi and Martinez-Gill on October 5, 1989, Martinez-Gill said that someone called "MG" was interested in a "trade out" in which Averi would provide $440,000 worth of cocaine in exchange for heroin, and that someone called "BJ" was MG's spokesman. Martinez-Gill also said that MG was having troubles with the Internal Revenue Service and MG owned a concrete company, a lounge, a club, and a limousine service. At trial, Martinez-Gill himself testified that "MG" was Guerrero and "BJ" was Maldonado.

On October 6, 1989, agent Averi had another telephone conversation with Martinez-Gill. Telephone records showed that Martinez-Gill called Averi using a phone in Maldonado's apartment. Martinez-Gill told Averi that BJ could bring five "blocks" to New York, and then BJ himself told Averi that he could bring five blocks to New York and that MG was leaving the details of the transaction to him. Later that day Martinez-Gill called Averi again and said that his superiors "at the ice house" had agreed to go through with the transaction. He also intimated that MG was leaving everything in BJ's hands and that BJ was involved in a romantic relationship with MG's daughter. The exact details, again, were left for later discussion.

Things did not go as Martinez-Gill had planned. In an October 17, 1989, telephone conversation with Averi and the confidential informant, Martinez-Gill said that MG was tied up in "IRS court" and that everyone was in a "paranoia stage." At one

point Martinez-Gill even asked, "Are you sure we're not dealing with the DEA?" Averi testified that he never actually conducted any drug transaction with Martinez-Gill, BJ, or MG. DEA agent Thomas Wade testified at trial that he was working undercover in San Antonio in early 1990 and that he contacted Martinez-Gill representing himself to be a member of a New York drug-trafficking organization. Agent Wade met with Martinez-Gill on February 8, 1990, and Martinez-Gill gave him a small piece of a substance that field-tested positive for heroin or opiates. Wade also testified that Martinez-Gill had a beeper and that Martinez-Gill's beeper number was written in a phone book recovered from Guerrero at the time of Guerrero's later arrest. Martinez-Gill was arrested by agent Wade after delivering the small piece of heroin to him.

The government's investigation also revealed that Guerrero's next-door neighbors obtained an additional phone line for their residence at Mrs. Guerrero's request in November 1989, and a telephone wire was strung running from their kitchen window into Guerrero's bedroom. Guerrero paid the phone bills for this telephone line. Telephone records showed that this line was used to call a certain number in Mexico fifteen times between November 1989 and January 1990; the Mexican number was listed in Guerrero's personal phone book as belonging to one "Val Lopez." The government called as a witness Texas Department of Public Safety ("DPS") officer Wayne Watson, who testified that in June 1989 he and a partner arrested Valentin Lopez Terrazas on

Interstate 10 east of San Antonio. After stopping Terrazas for speeding and excessively darkened or tinted windows, Watson obtained permission to search Terrazas' car and discovered $40,000 in bundles of small bills as well as traces of marijuana.

Other evidence at trial connected Guerrero and Terrazas. Onesimo Bernal testified that he had introduced Guerrero and Terrazas at Guerrero's request. Guerrero asked Bernal to make the introduction because he wanted to conduct drug trafficking with Terrazas. Bernal identified a telephone number written in Guerrero's personal phone book as belonging to Terrazas. Bernal also testified that he saw Terrazas in San Antonio between June 1988 and sometime in 1990 and that Terrazas told him that he was in San Antonio to do business with Guerrero.

2. *The State Investigation*

An important government witness at trial was Carlos Carreon. He testified that he spent several years in prison in the 1980s for a drug-related felony, and that while he was in prison he met Guerrero. While in prison, he discussed drug trafficking with Guerrero, and after he was released from prison in November 1988, he went to San Antonio and contacted Guerrero at the Oasis. There Guerrero introduced him to Hernandez and Maldonado as members of his drug-trafficking organization and offered him employment as a drug runner. Carreon testified that he participated in a distribution of heroin by Maldonado on one occasion. In early 1989, however, Carreon decided to end his illegal activities and became a informant for the DPS and local

law enforcement agencies. He worked closely with DPS officers Raul Guerrero[1] and Kenneth Dracoulis, and investigator Jerry Brown of the Medina County Sheriff's Office.

Investigator Brown testified that he and Raul Guerrero went undercover and that they met with Hernandez on February 3, 1990, in a meeting arranged by Carreon. The meeting took place in Castroville, Texas, west of San Antonio. Brown and Raul Guerrero paid Hernandez $2600 and received quantities of two substances that tested positive for heroin and cocaine respectively. Raul Guerrero testified that he met Hernandez alone on February 9, 1990, and paid him $1250 for some more cocaine. DPS officer Dracoulis testified that he accompanied Carreon to an apartment complex in San Antonio on the afternoon of February 9, 1990, and that Carreon unsuccessfully tried to buy some cocaine from Maldonado. Dracoulis waited in the car, and he saw Carreon and Maldonado come out from an apartment. Carreon told Dracoulis that Maldonado wouldn't sell any drugs to him if he brought anyone else to the apartment. On February 12, 1990, Brown met with Hernandez again in Castroville and again bought some heroin from him for $1300.

The next in this long series of drug transactions occurred on February 13, 1990. Carreon and Raul Guerrero went to the Guerreros' home to buy some heroin. Raul Guerrero remained in the car parked a few houses away, and Carreon went into

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[1] For clarity's sake, officer Raul Guerrero will be referred to in this opinion as "Raul Guerrero," while the appellant Martin Guerrero will be referred to simply as "Guerrero."

Guerrero's residence. Pursuant to standard operating procedures, Raul Guerrero searched Carreon thoroughly before allowing him to go to Guerrero's residence to make sure that Carreon did not already have drugs in his possession. Carreon returned to the car with some heroin, and Raul Guerrero gave him the money to take back to Guerrero. Raul Guerrero met with Hernandez again in Castroville on March 6, 1990, and bought a quantity of heroin from Hernandez for $2100.

A different line of investigation involved informant Jesus Saldana. Saldana testified that he worked for Hernandez in late 1989 and early 1990 as a distributor of heroin and that Guerrero supplied Hernandez with the heroin that Hernandez ultimately provided to Saldana. Saldana was himself addicted to heroin at the time and sold heroin to maintain his own heroin habit. In early 1990, Saldana apparently began to fall into debt to his suppliers, and he testified that Guerrero put out a contract on his life. At this point Saldana contacted the DEA, and the DEA helped him pay his debts to the organization in return for his cooperation.

The DPS decided to close the noose around Hernandez. Raul Guerrero met with Hernandez at the Oasis on April 3, 1990. While they were discussing the possibility that Hernandez might be able to sell Raul Guerrero eight ounces of heroin, Guerrero drove up to the ice house in his car, sounded his horn, and motioned to Hernandez. Hernandez spoke to Guerrero briefly and returned to the negotiations with Raul Guerrero; Hernandez was decidedly more

cautious in dealing with Raul Guerrero after he spoke with Guerrero, and he remarked that only a police officer would have enough money to buy eight ounces of heroin. Nevertheless, Hernandez agreed to make the sale, and the next day he met Raul Guerrero in Castroville and gave him the heroin. Hernandez was arrested at that time. Although Guerrero posted bond, Hernandez was arrested again about a week later for violating his parole.

3. *The Federal Investigation: Part Two*

In June 1990, agents of the Federal Bureau of Investigation ("FBI") initiated a "reverse sting" undercover investigation directed at Guerrero, in which they hoped to sell drugs to and arrest Guerrero. FBI agent Antonio Franco and cooperating witness German Ferriola, a Colombian, conducted this investigation. At the time, Guerrero's drug trafficking associate Bernal was in federal custody for a drug offense. The federal investigators were aware that Bernal and Guerrero had had a dispute concerning some heroin Bernal had supplied to Guerrero. Guerrero had judged the heroin to be of poor quality and had thrown it away; he also refused to pay the whole purchase price to Bernal. This intelligence was to play a large part in the reverse sting operation.

Ferriola arranged a meeting with Guerrero by phone. On June 21, 1990, Ferriola and Franco met Guerrero at the Oasis, and Ferriola told Guerrero that he and Franco were there to talk about a debt Guerrero owed to Bernal. Guerrero was upset at this news and asked the two men if "Valentin" had sent them. He also

told them that Bernal was in prison and that he had warned Bernal never to testify or say anything about him. Guerrero said that he had threatened to kill Bernal and his family if Bernal ever said anything about him. Eventually, Guerrero demanded to know who Franco and Ferriola were; Franco showed him a false driver's license, and Guerrero said words to the effect that he would kill Franco if he were lying. Guerrero also said that he had already killed at least ten people. The conversation turned to drug trafficking, and Guerrero indicated that he did not need any heroin but that he did need cocaine. The agents told Guerrero that they had forty-seven kilos of cocaine available, and that they could immediately sell him two kilos of cocaine for $26,000. The details of the sale were left for later discussion.

On June 22, 1990, Franco spoke with Guerrero by phone. Guerrero said that he would send someone to Franco's motel to pick up the cocaine. He described the courier and told Franco that the courier would say, "The man sent me." Guerrero said he would have the courier call Franco to get Franco's location. A few minutes after Franco's conversation with Guerrero ended, Franco received a call from someone who said, "The man said for me to call you." Franco told the unidentified man where his motel was, and the man said he was on his way. About half an hour later Maldonado arrived. A video camera and a microphone were concealed in the room to record the transaction.

When Maldonado arrived at Franco's room he knocked and gave the password. Franco gave him a car key and told him to take a

package out of the trunk of a car that would arrive shortly. Franco pointed out the correct car to Maldonado, who left the room and opened the trunk of the car. When he removed a black bag from the trunk he was arrested. Guerrero was arrested later that day.

B. Procedural History

Guerrero, Maldonado, Hernandez, and Martinez-Gill were charged by indictment with one count of conspiring to possess cocaine and heroin with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846. The indictment alleged numerous supporting overt acts. The indictment contained a second count charging Guerrero and Maldonado with attempting to possess cocaine with intent to distribute and aiding and abetting each other in attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846, and in violation of 18 U.S.C. § 2. The defendants were tried by jury from March 30 to April 2, 1992, and the jury found all defendants guilty as charged.

On July 9, 1992, the district court sentenced the defendants as follows: Guerrero, Hernandez, and Martinez-Gill were sentenced to life imprisonment, and Maldonado was sentenced to 140 months imprisonment and five years supervised release. A special assessment was also imposed on each defendant. Each filed a timely notice of appeal.

II. DISCUSSION

A. MARTIN R. GUERRERO, JR.

Guerrero raises seven issues on appeal.

1. *Bias*

Guerrero argues that his trial was unfair because the presiding judge was prejudiced against him. He filed a post-trial motion to depose the judge to determine his impartiality, and the judge denied the motion. The only support Guerrero provides for his claim is a letter the district judge wrote to a different prisoner expressing the judge's views as to the seriousness of drug crimes. We considered and rejected this identical contention in United States v. Devine, 934 F.2d 1325, 1348 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992). Adhering to our rule that we must follow indistinguishable decisions of panels of our court unless they are overruled en banc or by the United States Supreme Court, Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1121 n.8 (5th Cir. 1992), we reject Guerrero's argument without further discussion.

2. *Right to Call Witnesses*

At Guerrero's request, pretrial services officer Mary Meade was subpoenaed. Meade was responsible for supervising Guerrero after he was released on bond in connection with the IRS proceedings against him. Guerrero's trial counsel made a proffer, indicating that Meade would have testified that Guerrero told her that he knew that he was being set up by law enforcement agents for a drug-related arrest and conviction. This would have

tended to negate the intent elements of the crimes with which Guerrero was charged. The trial judge, however, refused to allow Meade to testify. The judge stated that Meade's testimony was inadmissible under 18 U.S.C. § 3153, which governs the organization and administration of pretrial services, and that Meade's testimony also would have been inadmissible hearsay. Guerrero now contends that the trial judge's ruling violated his Sixth Amendment right to call witnesses in his defense.

The Sixth Amendment guarantees the right to the accused in all criminal prosecutions "to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. This right is violated when the government arbitrarily denies a criminal defendant the right to call a witness who was physically and mentally capable of testifying to events that he or she personally observed and whose testimony would have been relevant and material to the defense. Washington v. Texas, 388 U.S. 14, 23 (1967). If a criminal defendant is denied compulsory process, he must at least make some plausible showing that the desired witness's testimony would have been both material and favorable to the defense. United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). We have held that a defendant's Sixth Amendment rights are not violated if he is denied the opportunity to call a witness whose testimony would be merely cumulative. Roussell v. Jeane, 842 F.2d 1512, 1516 (5th Cir. 1988); Ross v. Estelle, 694 F.2d 1008, 1010 (5th Cir. 1983); Calley v. Callaway, 519 F.2d

184, 219 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976).

The trial judge concluded that Guerrero could not call Meade to the stand to testify as to what Guerrero told her in her role as his pretrial services officer based on 18 U.S.C. § 3153(c)(1), which provides that "information obtained in the course of performing pretrial services functions in relation to a particular accused shall be used only for the purposes of a bail determination and shall otherwise be confidential." Such confidential information "is not admissible on the issue of guilt in a criminal judicial proceeding unless such proceeding is a prosecution for a crime" related to the accused's pretrial release or subsequent failure to appear. 18 U.S.C. § 3153(c)(3). Other circuits have permitted the prosecution to use information obtained by pretrial services officers for purposes of impeachment. E.g., United States v. Wilson, 930 F.2d 616, 619 (8th Cir.), cert. denied, 112 S. Ct. 208 (1991). We have not discovered any case in which a defendant was precluded from calling a pretrial services officer at trial solely because of the operation of § 3153(c), although the Eighth Circuit has affirmed a district court's decision not to allow a defendant to call his pretrial services officer merely to show the defendant's good character. United States v. Meeks, 857 F.2d 1201, 1204 (8th Cir. 1988) (holding that the district court's refusal to allow the defendant to call his pretrial release investigator was not an abuse of discretion).

Guerrero's trial counsel unsuccessfully argued to the trial court that § 3153 is intended to protect the privacy interest of the criminal defendant and that a defendant should be allowed to waive that protection. The legislative history of § 3153 indicates that its drafters intended to protect the relationship between the pretrial services officer and the particular defendant. H.R. CONF. REP. No. 97-792, 97th Cong., 2d Sess. 8 (1982), reprinted in 1982 U.S.C.C.A.N. 2393, 2394. The conference committee explained that "[d]efendants may be reluctant to cooperate with pretrial services officers unless assured of the confidentiality of the information they reveal to the officers." Id. Arguably, this purpose is not served by applying the inadmissibility rule of § 3153(c)(3) to the criminal defendant who wishes to call his pretrial services officer as a witness at trial.

We need not decide whether the district court's exclusion of Meade's testimony violated Guerrero's Sixth Amendment right to compulsory process of witnesses because Guerrero has not shown that Meade's testimony was material to his defense. As detailed above, see supra part I.A, the evidence of Guerrero's guilt was very substantial, if not overwhelming. Additionally, Meade's testimony would have been cumulative to some extent; Guerrero himself testified that he was aware that Franco and Ferriola were probably law enforcement agents. Guerrero's Texas state parole officer also testified at trial that Guerrero had told him of his suspicion that law enforcement agents were trying to set him up

and "put him behind bars for good." We conclude that "there is no reasonable doubt about [Guerrero's] guilt whether or not [the] additional evidence is considered." Valenzuela-Bernal, 458 U.S. at 874 n.10 (citing United States v. Agurs, 427 U.S. 97, 112-13 (1976)).

3. *Use of Paid Informants as Witnesses*

Guerrero next argues that the district court erred in admitting the testimony of paid informants as evidence against him, relying on our decision in Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965). Williamson, however, was overruled by United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987) (en banc), cert. denied, 484 U.S. 1026 (1988). Cervantes-Pacheco now governs claims such as Guerrero's. In Cervantes-Pacheco, we held that the government may use the testimony of paid informants against criminal defendants as long as certain procedural safeguards are observed. The government must not use or encourage the use of perjured testimony; the government must completely and timely disclose the fee arrangement to the accused in accordance with Brady v. Maryland, 373 U.S. 83 (1963); the accused must be given an adequate opportunity to cross-examine the informant and government agents about any agreement to compensate the witness; and the trial court should give a special jury instruction pointing out the suspect credibility of paid witnesses. Cervantes-Pacheco, 826 F.2d at 315-16.

As the government points out in its brief, all these procedural safeguards were provided Guerrero in the instant case. Guerrero has not accused the government of suborning perjury. Guerrero's counsel took advantage of the ample opportunity permitted for cross-examination regarding the benefits received by the government's paid witnesses. The trial court cautioned the jury in its instructions to examine and weigh the testimony of paid witnesses with special care. Guerrero's argument is without merit.

4. *Sufficiency of the Evidence*

Guerrero contends that the district court should have granted him a judgment of acquittal with respect to the count charging him with conspiracy to possess cocaine and heroin with intent to distribute. The scope of our review of the sufficiency of the evidence after conviction by a jury is narrow. We must affirm if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993). We must consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. Pigrum, 922 F.2d at 253. The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. Id. at 254.

In order to prove conspiracy to possess narcotics with intent to distribute the government must prove that (1) a conspiracy to possess narcotics with intent to distribute existed, (2) the defendant knew of the conspiracy, and (3) the defendant voluntarily participated in the conspiracy. United States v. Hernandez-Palacios, 838 F.2d 1346, 1348 (5th Cir. 1988); see United States v. Cardenas, 9 F.3d 1139, 1157 (5th Cir. 1993), cert. denied, 1994 WL 161926 (U.S. May 31, 1994) (No. 93-8881). No proof of an overt act is required. Hernandez-Palacios, 838 F.2d at 1348; Cacace v. United States, 590 F.2d 1339, 1340 (5th Cir. 1979); United States v. Palacios, 556 F.2d 1359, 1364 n.9 (5th Cir. 1977). But see United States v. Shabani, 993 F.2d 1419 (9th Cir. 1993) (holding that the elements of a drug conspiracy under 21 U.S.C. § 846 do include an overt act requirement), cert. granted, 114 S. Ct. 1047 (1994). Among the factors that may be considered by the factfinder in determining whether a defendant is guilty of committing a drug conspiracy crime are "concert of action," presence among or association with drug conspirators, and "[e]vasive and erratic behavior." Cardenas, 9 F.3d at 1157. Of course, mere presence or association alone cannot suffice to establish that a person has voluntarily joined a conspiracy. United States v. Magee, 821 F.2d 234, 239 (5th Cir. 1987).

Ample evidence supports Guerrero's conspiracy conviction, as the statement of facts, supra part I.A, demonstrates. We cite only a few of the most potent pieces of evidence. Guerrero's

wife arranged for a "secret" telephone line to be installed in the Guerreros' neighbors' house, and the phone was used several times to call a Mexican telephone number linked to Terrazas, identified by Bernal as a drug trafficker. Guerrero was implicated in the telephone conversations involving Martinez-Gill, Maldonado, and agent Averi. Carreon testified that Guerrero recruited him to run drugs and that Guerrero introduced Maldonado and Hernandez to him as members of his drug-trafficking organization, and Saldana testified that Guerrero and Hernandez supplied him with heroin. Undercover agent Raul Guerrero witnessed a conversation between Hernandez and Guerrero implicating Guerrero in Hernandez's drug trafficking activities.

The evidence was sufficient to support Guerrero's conspiracy conviction.

5. *Effective Assistance of Counsel*

Guerrero contends that his trial counsel rendered him ineffective assistance at trial and alleges that the representation was tainted by a conflict of interest. The general rule in this circuit is that a claim of inadequate representation will not be considered on direct appeal unless it has first been raised before the district court. United States v. McCaskey, 9 F.3d 368, 380 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994). Exception to this rule is made only if the record is sufficiently developed with respect to the merits of the claim. Id. at 381.

The facts underlying Guerrero's claim are as follows. It appears that Guerrero's initial counsel was Alan Brown, who filed Guerrero's waiver of personal appearance at arraignment and plea of not guilty on September 25, 1991. Guerrero's trial counsel, Nancy Barohn, also filed pleadings on Guerrero's behalf; for instance, on October 9, 1991, she filed a motion for disclosure of exculpatory evidence. On October 24, 1991, the government filed a sealed motion for an evidentiary hearing regarding a possible conflict of interest between Brown and Guerrero, based on Brown's prior representation of Martinez-Gill and on information that Hernandez had told undercover investigators that Brown himself offered to provide cocaine to Hernandez. Barohn filed a sealed response opposing disqualification of Brown and requesting Guerrero's trial to be severed from that of his codefendants.

In February 1992, the district judge held a hearing on the government's motion and refused to disqualify Brown. In March 1992, the case was reassigned to District Judge Walter S. Smith. Shortly thereafter the government moved for another evidentiary hearing on the potential need to disqualify Brown, citing a pro se pleading filed by Guerrero complaining generally of "conflicts of interest." This time Brown and Barohn responded by seeking to withdraw as Guerrero's counsel. Barohn supported her request by contending that she had frequently associated with Brown and that she had shared confidential information with Brown regarding Guerrero's case. Barohn also contended that she had acted as

Brown's attorney in opposing the government's original motion to disqualify Brown and that her attorney-client relationship with Brown could hinder her representation of Guerrero. Judge Smith granted Brown's motion to withdraw and denied Barohn's motion to withdraw, concluding that she had not shown a real conflict of interest. Barohn renewed her motion to withdraw at the beginning of the trial, which commenced on March 30, 1992. The court denied her motion, stating that the motion had been waived because Barohn was thirty minutes late and missed the presentation of pretrial matters, and further that the court considered the motion frivolous.

Barohn represented Guerrero throughout the trial; Brown was never called as a witness, and Hernandez's alleged statement that Brown had offered to provide him with cocaine was never mentioned. After trial, Guerrero asked the court to disqualify Barohn, and Barohn filed another motion to withdraw as counsel of record. The court granted Barohn's motion.

We decline to resolve Guerrero's ineffective assistance claim on direct appeal because the record is insufficiently developed with respect to the merits of the claim. In particular, we find ourselves unable to evaluate Guerrero's conflict of interest claim at this stage in the proceedings. It is well-established that a defendant claiming ineffective assistance of counsel must ordinarily demonstrate that counsel's actions were objectively unreasonable and that the defendant was prejudiced as a result. Strickland v. Washington, 466 U.S. 668,

690, 693-94 (1984); McCaskey, 9 F.3d at 381. Under Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), however, we will presume prejudice if the defendant can show that the representation suffered from an actual conflict of interest that adversely affected his lawyer's performance.

The peculiar nature of the conflict asserted by Guerrero prevents us from analyzing his claim on this record. Ordinarily, conflicts of interest involve simultaneous representation of codefendants or successive representation of codefendants and trial witnesses. Beets v. Collins, 986 F.2d 1478, 1492 (5th Cir.) (Higginbotham, J., concurring), reh'g en banc granted, 998 F.2d 253 (5th Cir. 1993). The conflict alleged by Guerrero does not fit these classic patterns. Nor does Guerrero show any adverse effects stemming from this alleged conflict. The record makes clear, however, that Barohn believed that her representation would suffer from a conflict of interest, and on the first day of trial she stated before the court, "I do want the record to reflect that I have failed to participate as a deliberate matter because I have felt definitely constrained from going forward in view of the conflicting situation I believe myself in with Mr. Guerrero." Although the government vigorously contends that we can resolve Guerrero's claim against him on direct appeal, we conclude that Guerrero should be allowed to investigate and develop his conflict of interest claim in future proceedings under 28 U.S.C. § 2255.

6. *Entrapment*

Guerrero contends that the court below erred in failing to require the federal agents to act fairly and lawfully in obtaining evidence in and prosecuting this case, and further that he was a victim of entrapment. His entrapment defense is plainly without merit; entrapment is an affirmative defense that requires the defendant to show that he was induced by a government agent to commit a criminal act that he was not predisposed to commit. United States v. Pruneda-Gonzalez, 953 F.2d 190, 197 (5th Cir.), cert. denied, 112 S. Ct. 2952 (1992). The defendant bears the threshold burden of establishing (1) that he lacked the predisposition to commit the crime and (2) that the government's inducement amounted to more than just an opportunity to commit the crime. Id. Only if the defendant meets this burden must the government come forward with proof beyond a reasonable doubt that the defendant was predisposed to commit the crime. Id. Guerrero cites no evidence that would shift the burden onto the government, so his entrapment argument must fail.

We conclude that Guerrero has also failed to show that his conviction violates due process because of "outrageous conduct" on the part of the government. This nebulous claim, whose existence was first suggested by the Supreme Court in United States v. Russell, 411 U.S. 423 (1973), is exceedingly difficult to prove. We have indicated that a due process violation will be found only in the rarest and most outrageous circumstances. United States v. Arditti, 955 F.2d 331, 343 (5th Cir.), cert.

denied, 113 S. Ct. 597 (1992); United States v. Allibhai, 939 F.2d 244, 248 (5th Cir.), cert. denied, 112 S. Ct. 967 (1991). Guerrero has not demonstrated that any such circumstances attended his investigation, arrest, and conviction.

Guerrero's conviction is AFFIRMED.

7. *Sentencing*

Guerrero raises one challenge to the sentence imposed on him by the district court. He was sentenced in July 1992, and we consider his sentence in light of the version of the sentencing guidelines effective at the time he was sentenced unless this rule would violate the Ex Post Facto Clause of the Constitution. United States v. Mills, 9 F.3d 1132, 1136 n.5 (5th Cir. 1993). A sentencing court's factual findings must be supported by a preponderance of the evidence, and we review such findings under the clearly erroneous standard. The sentencing court's interpretations of the guidelines, being conclusions of law, are reviewed de novo. McCaskey, 9 F.3d at 372.

The district court adopted the factual findings and application of the sentencing guidelines recommended in Guerrero's presentence investigation report ("PSR"). The PSR recommended increasing Guerrero's base offense level by three levels under § 2J1.7 of the sentencing guidelines because he had committed the offenses of conviction while on release from another federal charge. Guerrero contends that this adjustment should not have applied to him. The nature of Guerrero's challenge is unclear; he has simply quoted the objection made by

his counsel at the sentencing hearing, and that objection is singularly opaque. Having reviewed the written objections to the PSR filed by Guerrero's counsel, we conclude that he argued essentially that the drug conspiracy for which Guerrero was convicted spanned a long period of time, much of which was outside the period Guerrero was on release on bond in conjunction with the tax-related proceedings against him.

We review the relevant guideline and related statutory provision. The sentencing guidelines provide:

> If an enhancement under 18 U.S.C. § 3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.

United States Sentencing Commission, Guidelines Manual, § 2J1.7 (Nov. 1991).[2] Section 3147 of Title 18, United States Code, provides:

> A person convicted of an offense while released under this chapter [i.e., pending trial, sentencing, or appeal] shall be sentenced, in addition to the sentence prescribed for the offense toSQ
>
> (1) a term of imprisonment of not more than ten years if the offense is a felony; or
>
> (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

Guerrero does not dispute the accuracy of his PSR, which states that he was arrested for attempted income tax evasion on October 6, 1989, and that he began to serve a two-year sentence

[2] All references to the sentencing guidelines in this opinion are to the version effective November 1, 1991, unless otherwise indicated.

for the tax offense after his arrest for the instant drug offenses. This is apparently the basis for the PSR's conclusion that sufficient evidence existed to support the finding that Guerrero committed the drug offenses while on release from other federal charges. The district court expressly approved the PSR's recommendation that § 2J1.7 should apply, finding that Guerrero committed a portion of the drug offenses while on release in the tax case.

A PSR generally bears sufficient indicia of reliability to be considered by the trial court as evidence in making the factual determinations required by the sentencing guidelines. United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993); United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992). A district court may rely on the presentence investigation report's construction of the evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts. Robins, 978 F.2d at 889. At sentencing, the government introduced a certified copy of the order setting Guerrero's conditions of release in conjunction with the tax proceedings against him, demonstrating that some of Guerrero's drug-related offense conduct was committed while Guerrero was on release. The district court's factual findings and application of § 2J1.7 were not in error.

Guerrero's sentence is AFFIRMED

B. Bernabe G. Maldonado

Maldonado raises essentially two issues on appeal.

1. *Sufficiency of the Evidence*

Maldonado's theory is that the government failed to prove the existence of a single conspiracy between or among the named defendants to possess with intent to distribute cocaine and heroin as charged in count one of the indictment. He contends that the government's evidence demonstrated only a series of distinct and independent drug transactions involving Hernandez only, or at most Hernandez and Guerrero. He also contends that the evidence related to the investigation involving Martinez-Gill was insufficient to support a finding that Maldonado committed all the elements of conspiracy with respect to the attempted cocaine-for-heroin transaction. Finally, he argues that the government's evidence regarding the events leading to Maldonado's arrest did not prove Maldonado's guilt of conspiracy beyond a reasonable doubt.

Maldonado's argument is without merit. His contention that the government did not prove that he belonged to the single overarching conspiracy alleged in the indictment is actually a claim of material variance between the offense charged in the indictment and the proof relied upon at trial. See United States v. Hernandez, 962 F.2d 1152, 1159 (5th Cir. 1992) ("[A] variance between the offense charged in the indictment and the proof relied upon at trial constitutes reversible error if it affects the substantial rights of the defendant."). We have held that whether evidence establishes a single or multiple conspiracies is a fact question for the jury to decide. United States v.

Ellender, 947 F.2d 748, 759 (5th Cir. 1991). The district court followed the practice, which we have approved, see Hernandez, 962 F.2d at 1159, of using a special jury instruction to remind the jury that the government had to prove the defendants were members of the conspiracy charged in the indictment. Whether the evidence shows the existence of one or multiple conspiracies depends on such factors as (1) the existence of a common goal or purpose; (2) the nature of the scheme; and (3) overlapping of participants in the various dealings. Id. In the instant case, the evidence showed that Guerrero was a pivotal figure in the drug trafficking activities proved by the government and had extensive dealings with the various participants (with the exception of Martinez-Gill). The existence of such a pivotal figure may satisfy the requirement of overlapping participants in the various dealings. Id. We agree with the government that the activities of the conspirators demonstrated that they shared a common purposeSQcooperation for the purpose of turning a profit from their illegal drug traffickingSQand that the transactions proved by the government all fit the nature of the alleged scheme, to distribute illegal drugs.

We AFFIRM Maldonado's conviction.

2. *Sentencing*

Maldonado contends that the district court should have reduced his total offense level by four levels because the evidence showed that he was a minimal participant in the crimes of conviction. Under U.S.S.G. § 3B1.2, offenders who are

substantially less culpable than other participants in the offense may receive reductions of two, three, or four levels. The decision whether to apply § 3B1.2 is a determination that is heavily dependent upon the facts of the particular case. U.S.S.G. § 3B1.2 comment. (backg'd). The district court's denial of a reduction under § 3B1.2 is therefore entitled to great deference and should not be disturbed except for clear error. Devine, 934 F.2d at 1340. A finding of fact is clearly erroneous when, although there is enough evidence to support it, the reviewing court is left with a firm and definite conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Henderson v. Belknap (In re Henderson), 18 F.3d 1305, 1307 (5th Cir. 1994).

The government contends that the evidence at trial clearly showed Maldonado to be a more important figure in the conspiracy than a mere courier. The evidence concerning the negotiations between Martinez-Gill and agent Averi indicated that Maldonado enjoyed some authority in arranging the details of the cocaine-for-heroin transaction. Maldonado was intimately involved with the conspiracy's attempt to buy cocaine from undercover agents Franco and Ferriola. Carreon testified that he was introduced to Maldonado by Guerrero as a member of Guerrero's drug-trafficking organization. We have noted that a district court should not award a minor participation adjustment simply because a defendant does less than other participants; the defendant must have done so little as to be "peripheral to the advancement of the illicit

activity." United States v. Thomas, 932 F.2d 1085, 1092 (5th Cir.), cert. denied, 112 S. Ct. 428 (1991). The district court's conclusion that Maldonado was not entitled to a reduction under § 3B1.2 was not clearly erroneous.

Maldonado's sentence is AFFIRMED.

C. Carlos Barrera Hernandez

Hernandez raises several challenges to his conviction and sentence.

1. *Double Jeopardy, Collateral Estoppel and Due Process*

Hernandez makes three arguments based on the following facts. Hernandez filed a pre-trial motion to dismiss the indictment on double jeopardy grounds, which the district court denied. The government concedes that Hernandez was charged in July 1991 with distributing over 100 grams of heroin on April 4, 1990, and that Hernandez was convicted of that charge prior to the trial in the instant case. The indictment under which Hernandez and his codefendants were tried in the instant case listed Hernandez's distribution of heroin on April 4, 1990, as an overt act in furtherance of the conspiracy, and the government proved Hernandez's distribution of heroin on that date at trial. Hernandez argues that the instant prosecution violated his right to be free from double jeopardy and that the district court therefore erred in denying his motion to dismiss the indictment. We review the district court's denial of a motion to dismiss an indictment on the ground of double jeopardy de novo, accepting the underlying factual findings of the district court unless

clearly erroneous. United States v. DeShaw, 974 F.2d 667, 669 (5th Cir. 1992).

Hernandez premises his double jeopardy claim on Grady v. Corbin, 495 U.S. 508 (1990), and its progeny such as United States v. Rodriguez, 948 F.2d 914 (5th Cir. 1991), and Ladner v. Smith, 941 F.2d 356 (5th Cir. 1991). The Grady line of cases, however, has been overruled by United States v. Dixon, 113 S. Ct. 2849 (1993). Wright v. Whitley, 11 F.3d 542, 545-46 (5th Cir. 1994). After Dixon, double jeopardy analysis once again focuses on the "offense" for which the defendant is being prosecuted and punished, rather than on the conduct subject to the criminal prohibition. United States v. Cruce, 21 F.3d 70, 73 n.3 (5th Cir. 1994). Accordingly, the test established by the Court in Blockburger v. United States, 284 U.S. 299 (1932), is the only hurdle the prosecution must overcome to avoid a double jeopardy bar. United States v. Singleton, 16 F.3d 1419, 1442 (5th Cir. 1994). When considering whether multiple punishments constitute impermissible "multiple punishments for the same offense," we compare the criminal statutes at issue and inquire whether each provision requires proof of an additional fact that the other does not. Id. (citing Blockburger, 284 U.S. at 304).

Convictions for both conspiracy and the substantive offense that is the object of the conspiracy generally do not constitute double jeopardy, even when prosecuted under separate indictments. United States v. Marden, 872 F.2d 123, 125 (5th Cir. 1989). In the instant case, the count charging the offense of conspiracy

required the government to prove that Hernandez voluntarily joined a conspiracy, which is not an element of the offense of heroin distribution. At the same time, the offense of heroin distribution requires the government to prove that the defendant distributed heroin, see 21 U.S.C. § 841(a)(1) ("[I]t shall be unlawful for any person knowingly or intentionally . . . to . . . distribute . . . a controlled substance."), which is not an element of the offense of conspiracy. The government may therefore prosecute both crimes without running afoul of the Double Jeopardy Clause. See United States v. Garcia, 589 F.2d 249, 251 (5th Cir.) (concluding that the government may prosecute a defendant for both conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute), cert. denied, 442 U.S. 909 (1979). Hernandez's double jeopardy claim is without merit.

Hernandez next raises a collateral estoppel argument based on the celebrated case of Ashe v. Swenson, 397 U.S. 436 (1970). In Ashe, the defendant was charged with robbing a participant in a poker game; the Court held that the prosecution was barred by the Double Jeopardy Clause because the defendant had previously been acquitted of robbing a different participant in the same poker game and because the acquittal was necessarily based on the theory that the defendant was not one of the robbers. Id. at 445. Ashe is not applicable to Hernandez's case. As we observed in Rodriguez, the Ashe inquiry is whether the second prosecution is collaterally estopped because it requires relitigation of a

factual issue that was necessarily resolved in the first prosecution. Rodriguez, 948 F.2d at 917; see also Wright, 11 F.3d at 546 ("[T]he Ashe holding only bars relitigation of a previously rejected factual allegation where that fact is an ultimate issue in the subsequent case."). As Justice Scalia stated in Dixon, the collateral estoppel effect of the Double Jeopardy Clause "may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts," but the government may still bring separate prosecutions and win them both. 113 S. Ct. at 2860.

Finally, Hernandez contends that the successive prosecutions cited above violate his substantive due process right to fundamental fairness and freedom from arbitrary and unreasonable government action. The contention is without merit. The cases cited by Hernandez do not support an extension of substantive due process doctrine to these facts. The protections of substantive due process have for the most part been accorded to matters related to marriage, family, procreation, and bodily integrity. Albright v. Oliver, 114 S. Ct. 807, 812 (1994) (plurality opinion). The Supreme Court has recently "decline[d] to use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend." Dowling v. United States, 493 U.S. 342, 354 (1990). We likewise decline the invitation.

2. *Sufficiency of the Evidence*

Hernandez contends that there was insufficient proof that he had any connection to any of his co-defendants and their conduct. He adds that the government proved only that he dealt with law enforcement agents, and that "[i]t is axiomatic that a criminal cannot conspire with undercover law enforcement officials." Mergerson, 4 F.3d at 346 n.9.

We reject Hernandez's claim. The evidence showed that Hernandez was introduced to Carreon by Guerrero as a member of Guerrero's drug trafficking organization. The evidence also showed that Hernandez consulted with Guerrero during the heroin negotiations that took place at the Oasis on April 3, 1990. Saldana testified that he received heroin from Hernandez, who in turn had received it from Guerrero. We conclude that the jury could have relied upon these pieces of evidence, together with Hernandez's presence at the Oasis and close association with his codefendants, to find Hernandez guilty as charged beyond a reasonable doubt. See Cardenas, 9 F.3d at 1157 ("[P]resence or association is a factor that, along with other evidence, may be relied upon to find conspiratorial activity by the defendant.").

3. *Cumulative Errors*

Hernandez makes a last-ditch effort to obtain reversal of his conviction based on the cumulative effect of "numerous" errors that occurred at his trial. We have noted that a party who offers "only a bare listing of alleged grounds for a new trial, without citing supporting authorities or references to the record," is considered to have abandoned those claims on appeal.

United States v. Ballard, 779 F.2d 287, 295 (5th Cir.), cert. denied, 475 U.S. 1109 (1986). Hernandez does not make even this inadequate showing.

Hernandez's conviction is AFFIRMED.

4. *Sentencing*

Hernandez raises a number of challenges to the life sentence imposed on him by the district court. We need discuss only his claim that he was erroneously sentenced as a career offender under U.S.S.G. § 4B1.1.

The career offender guideline was promulgated to implement 28 U.S.C. § 994(h), which provides:

> The [Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older andSQ
> (1) has been convicted of a felony that isSQ
> (A) a crime of violence; or
> (B) an offense described in [any of 21 U.S.C. §§ 841, 952(a), 955, 959, or 955a)]; and
> (2) has previously been convicted of two or more prior felonies, each of which isSQ
> (A) a crime of violence; or
> (B) an offense described in [any of 21 U.S.C. §§ 841, 952(a), 955, 959, or 955a].

Section 4B1.1 of the guidelines, however, does not precisely track the language of 28 U.S.C. § 994(h) in defining who is a "career offender" for purposes of enhanced punishment. Section 4B1.1 provides:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

"Controlled substance offense" is defined in U.S.S.G. § 4B1.2 n.1 to include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses. Under U.S.S.G. § 4B1.1, a defendant who meets the definition of "career offender" as set forth in that section must be assigned a minimum offense level based on the statutory maximum sentence for the instant offense (e.g., if the statutory maximum sentence is life imprisonment, the defendant's minimum offense level is thirty-seven). Additionally, the defendant's criminal history category is automatically upgraded to Category VI.

The problem pointed out by Hernandez is that U.S.S.G. § 4B1.1 sweeps more broadly than 28 U.S.C. § 994(h). The statutory definition of defendants that should be subject to enhanced punishment includes defendants convicted under 21 U.S.C. § 841(a), which punishes the substantive offenses of manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense a controlled substance. The statutory definition does not include defendants (such as Hernandez) convicted under 21 U.S.C. § 846 for conspiring to commit an offense listed in 21 U.S.C. § 841(a). Thus, U.S.S.G. § 4B1.1 prescribes a more serious penalty for Hernandez than he would otherwise receive under the guidelines, even though he does not come within the statutory definition of career offenders that the Sentencing Commission is directed to treat most harshly by 28 U.S.C. § 994(h).

Another panel of our court recently considered the identical argument and, following the lead of the Court of Appeals for the District of Columbia Circuit in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993), held that § 4B1.1 is invalid to the extent that its scope reaches beyond the crimes actually listed in 28 U.S.C. § 994(h). United States v. Bellazerius, 1994 WL 266747 (5th Cir. June 17, 1994) (Nos. 93-3157 and 93-3168). Under Bellazerius, § 4B1.1 should not have applied to Hernandez. We therefore VACATE Hernandez's sentence and REMAND his case to the district court for resentencing.

D. ROBERT MARTINEZ-GILL

Martinez-Gill raises several challenges to his conviction and sentence.

1. *Sufficiency of the Evidence*

Martinez-Gill contends that the evidence adduced against him at trial was insufficient to support his conviction for conspiracy to possess cocaine and heroin with intent to distribute. He argues that the only evidence implicating him in illegal activities actually exculpated him of the crime of conspiracy because no agreement to possess cocaine and heroin was ever reached with him as a party; like Maldonado, he complains that he was prejudiced by a material variance between the offense charged in the indictment and the proof relied upon by the government at trial. We reject his argument just as we have rejected Maldonado's, see supra part II.B.1.

Whether evidence establishes a single or multiple conspiracies is a fact question for the jury to decide. Ellender, 947 F.2d at 759. We have already observed that the district court gave the jury a special instruction to minimize the danger that the defendants would be convicted for any conspiracy other than the one alleged in the indictment. We must affirm a jury's finding that the government proved a single conspiracy unless the evidence and all reasonable inferences, examined in the light most favorable to the government, would preclude a rational jury from finding a single conspiracy beyond a reasonable doubt. United States v. DeVarona, 872 F.2d 114, 118 (5th Cir. 1989).

Several pieces of evidence tended to prove Martinez-Gill's membership in the single overarching conspiracy alleged by the government. Martinez-Gill told agent Averi on more than one occasion that "MG" had approved of his arranging a trade of heroin for cocaine, and he also described his cohorts as being his superiors "at the ice house." These telephone conversations connected Martinez-Gill to the drug trafficking conspiracy that operated out of the Oasis Ice Station in 1989 and 1990. Even more probative of Martinez-Gill's guilt of the conspiracy charged was the evidence of Martinez-Gill's close contact with Maldonado, an integral member of the conspiracy and close associate of Guerrero. Martinez-Gill even used the telephone in Maldonado's apartment to contact agent Averi in New York, and Maldonado himself told Averi that he (Maldonado) could personally bring the

heroin to New York and that Guerrero was leaving the details of the transaction to Maldonado to work out. Viewed in the light most favorable to the government, this evidence is sufficient to support the guilty verdict returned against Martinez-Gill for the conspiracy charged in the indictment.

The factors we have identified in cases such as Hernandez, 962 F.2d at 1159, as relevant to the determination of whether the government has proved a single or multiple conspiracies do not offer Martinez-Gill solace. The first factor, whether a common goal has been shown, is easily satisfied by showing that the alleged coconspirators shared the same general goal, such as passing a large number of counterfeit bills over a period of time. United States v. Richerson, 833 F.2d 1147, 1153 (5th Cir. 1987) (citing United States v. Lloyd, 425 F.2d 711, 712 (5th Cir. 1970)); see id. (noting that this court has recognized such broad "common goals" as to make this factor almost "a mere matter of semantics"). The defendants' cooperation for the purpose of making money from drug trafficking shows their common purpose. Likewise, the nature of the alleged scheme was simply the distribution of illegal drugs for profit, with Guerrero serving as a key supplier for his couriers and the Oasis Ice Station serving as a central headquarters. Having Martinez-Gill obtain a New York source of large amounts of cocaine fits the nature of the scheme alleged by the government. The last factor, the overlapping of participants, id. at 1154, is satisfied in this case by Martinez-Gill's self-proclaimed connections with

Guerrero, the pivotal figure in this conspiracy, and Maldonado, one of his closest associates.

Martinez-Gill's contention that a material variance prejudiced his substantial rights is without merit.

2. *Double Jeopardy and Collateral Estoppel*

Martinez-Gill next contends that the district court erred in denying his pretrial motion to dismiss the indictment on double jeopardy grounds. As we stated in part II.C.1, supra, we review the district court's denial of the motion to dismiss on double jeopardy grounds de novo, accepting the district court's factual findings unless clearly erroneous. DeShaw, 974 F.2d at 669.

Martinez-Gill was arrested on February 8, 1990, for selling heroin to agent Wade. Over a year before the indictment for conspiracy in the instant case was filed, Martinez-Gill was indicted for distributing heroin on February 8, 1990, in violation of 21 U.S.C. § 841(a)(1). Martinez-Gill ultimately pleaded guilty to the distribution charge; he claims that he did so because the government planned to introduce tapes of his conversations with agent Averi into evidence if the case went to trial. Like Hernandez, Martinez-Gill relies on Grady v. Corbin, 495 U.S. 508 (1990), overruled by United States v. Dixon, 113 S. Ct. 2849 (1993).

Martinez-Gill's challenge, like that of Hernandez, is without merit. A defendant may ordinarily be convicted for both conspiracy and the substantive offense that is the object of the conspiracy, even if the convictions are obtained under separate

indictments. Marden, 872 F.2d at 125. Martinez-Gill's case comes within the general rule for the same reasons that Hernandez's case does, see supra part II.C.1. Nor is this case appropriate for application of the collateral estoppel doctrine of Ashe v. Swenson because it does not present "a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts." Dixon, 113 S. Ct. at 2860 (emphasis omitted).

Martinez-Gill's double jeopardy and collateral estoppel claims are without merit.

3. *Breach of Plea Agreement*

Martinez-Gill next contends that the government breached a term of his plea agreement in his earlier conviction for heroin distribution by introducing into evidence the tapes of Martinez-Gill's telephone conversations with agent Averi. He also argues that the district court should have held an evidentiary hearing regarding this claim. We note that Martinez-Gill's plea agreement from the heroin distribution prosecution contains no promise by the government not to use the taped conversations against Martinez-Gill in future prosecutions. The government also points out that Martinez-Gill affirmed at his plea colloquy in the earlier prosecution that no special promises outside the plea agreement had been made by the government. Finally, it does not appear that Martinez-Gill objected to admission of the taped conversations during the instant trial or ever brought his concern to the attention of the district court.

Ordinarily a defendant may not refute his own testimony given under oath when pleading guilty. United States v. Fuller, 769 F.2d 1095, 1099 (5th Cir. 1985). We have indicated that a defendant who wishes to undermine his testimony at a plea colloquy is entitled to a hearing only if he offers specific factual allegations supported by the affidavit of a reliable third person. Id. Martinez-Gill has not met this test; indeed, it does not appear that he ever even requested a hearing from the district court. Additionally, Martinez-Gill's failure to object to the admission of the tapes into evidence waives his right to complain on appeal. United States v. Williams, 998 F.2d 258, 262 (5th Cir. 1993), cert. denied, 114 S. Ct. 940 (1994); see also FED. R. EVID. 103 (providing that a timely objection to a ruling admitting evidence is a prerequisite to complaining of any error on appeal but permitting courts to take notice of plain error).

4. *Effective Assistance of Counsel*

Martinez-Gill challenges the effectiveness of his trial counsel based on counsel's failure to object to the admission of the taped conversations between Martinez-Gill and agent Averi and his failure to pursue an interlocutory appeal from the denial of Martinez-Gill's motion to dismiss based on double jeopardy. He also complains of his counsel's failure in the earlier prosecution for distribution of heroin to procure a written assurance from the government that the tapes would not be used against Martinez-Gill in any future prosecutions.

We do not reach the allegation of ineffective assistance of counsel with respect to counsel's actions during Martinez-Gill's prior prosecution for heroin distribution because the record from that proceeding is not before us. Thus, the record is insufficiently developed with respect to the merits of Martinez-Gill's claim to permit review of that claim on direct appeal. See McCaskey, 9 F.3d at 380-81. Likewise, the record is not sufficiently developed to allow us to evaluate Martinez-Gill's claim based on counsel's failure to object to admission of the taped conversations. Martinez-Gill is free to develop his claims in future proceedings under the habeas corpus statute.

5. *Severance*

Martinez-Gill contends that the district court committed reversible error in denying his pretrial motion for severance. We review the denial of a motion for severance for abuse of discretion. United States v. Arzola-Amaya, 867 F.2d 1504, 1516 (5th Cir.), cert. denied, 493 U.S. 933 (1989). To demonstrate an abuse of discretion, the defendant must bear the heavy burden of showing that he suffered specific and compelling prejudice against which the district court was unable to afford protection and that this prejudice resulted in an unfair trial. United States v. Dillman, 15 F.3d 384, 393-94 (5th Cir. 1994); see also Zafiro v. United States, 113 S. Ct. 933, 938 (1993) ("[A] district court should grant a severance under Rule [of Criminal Procedure] 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants,

or prevent the jury from making a reliable judgment about guilt or innocence.").

Martinez-Gill claims that the denial of his motion for severance effectively denied him his right against self-incrimination. He attempts to support his claim by pointing out that Guerrero had previously been convicted of murder and that Hernandez had previously been convicted of attempted murder. In his view, the joint trial somehow compelled Martinez-Gill not only to testify but also to testify to facts favorable to his codefendants and unfavorable to his own defense. He insists at the same time, however, that all his testimony was true and correct. He does not explain why he did not simply refuse to testify; he does not cite any record evidence for the proposition that he testified out of fear, nor does it appear that this was ever the basis for his motion for severance before the district court. We conclude that Martinez-Gill has not shown any abuse of discretion by the district court.

Martinez-Gill's conviction is AFFIRMED.

6. *Sentencing*

We next consider Martinez-Gill's contentions that the district court erred in imposing a life sentence on him.

According to Martinez-Gill's PSR, he would ordinarily be sentenced under the guidelines according to a total offense level of thirty and a criminal history category of IV, yielding a sentence range of 135 to 168 months. However, the government filed a sentencing enhancement information before trial notifying

Martinez-Gill that the government intended to seek enhanced punishment pursuant to 21 U.S.C. § 841(b)(1)(A). Under that provision, a life sentence is mandatory if it is proved (1) that the offense of conviction involved one kilogram or more of a substance containing heroin or five kilograms or more of a substance involving cocaine, and (2) that the defendant already has two final convictions for felony drug offenses. 21 U.S.C. §§ 841(b)(1)(A)(i), (ii). Under 21 U.S.C. § 846, this penalty also applies to defendants convicted of conspiracy to commit a crime listed in § 841(a), such as conspiracy to commit possession of a controlled substance with intent to distribute. Martinez-Gill does not dispute that he had two prior felony drug convictions at the time of the instant conviction; he contends that the government failed to prove that the requisite amounts of heroin or cocaine were properly attributable to him for sentencing purposes.

In order to sentence Martinez-Gill to a mandatory life sentence of imprisonment under 21 U.S.C. §§ 841(b)(1)(A) and 846, the district court had to find by a preponderance of the evidence that Martinez-Gill actually possessed or conspired with his coconspirators to possess over a kilogram of cocaine or over five kilograms of cocaine during the offense of conviction. United States v. Mergerson, 4 F.3d 337, 346 (5th Cir. 1993) (applying the foregoing test rather than any provision of the sentencing guidelines). It is uncontested that Martinez-Gill was proved to have possessed only about nine grams of heroin himself, so if the

sentence is to be upheld the evidence must support a finding that Martinez-Gill conspired to possess the threshold amounts of heroin or cocaine. The government identifies two possible methods of attributing the necessary amount of drugs to Martinez-Gill. First, the government relies on the taped telephone conversations involving Martinez-Gill, Maldonado, and agent Averi, contending that they indicate an agreement between Martinez-Gill, Maldonado, and Guerrero to possess five to eight kilograms of heroin, to be swapped for cocaine. Second, the government relies on the total amounts of cocaine and heroin distributed and possessed by all members of the conspiracy, arguing that all such amounts should be attributed to Martinez-Gill, even if possessed or distributed after Martinez-Gill's arrest.

The government's first argument, which is based on the amount of drugs Martinez-Gill, Maldonado, and agent Averi negotiated in their telephone conversation, is hampered by a statement in Martinez-Gill's PSR that the five "blocks" of heroin under discussion referred to five ounces rather than five kilograms. This defect, however, is not fatal. Agent Averi testified at trial at length about his negotiations with Martinez-Gill and Maldonado, and he clearly stated that the "blocks" of drugs being discussed were kilograms, not ounces. Although a criminal cannot conspire with law enforcement officials, id. at 346 n.9, Martinez-Gill negotiated the swap of five kilograms of heroin not only with DEA agent Averi but also

with coconspirator Maldonado, who agreed to transport the heroin to New York. Additionally, Averi promised to give Maldonado two and a half blocks of cocaine for each block of heroin that Maldonado brought to New York, so the conspirators also agreed to possess substantially more than five kilograms of cocaine once the transaction was completed. In short, this is not a case like Mergerson, in which the government introduced insufficient evidence to support a finding that Mergerson had conspired with anyone (except government agents) to possess sufficient drugs to trigger § 841(b)(1)(A). Id. at 346 & n.9.

We conclude that the district judge, who presided over both Martinez-Gill's trial and his sentencing, did not clearly err in determining that the mandatory life sentence of § 841(b)(1)(A) should apply to Martinez-Gill.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the convictions and sentences of Guerrero, Maldonado, and Martinez-Gill. We AFFIRM Hernandez's conviction but VACATE his sentence and REMAND for resentencing.