UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-8480

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLYDE RAY DEVERS AND SAM LARRY REYES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-91-CR-101)

August 30, 1993

Before JONES, DeMOSS, Circuit Judges, and KAZEN, District Judge.[1]

KAZEN, DISTRICT JUDGE.*

Clyde Ray Devers and Sam Larry Reyes were convicted by a jury of Count One of the Second Superseding Indictment, charging a conspiracy to distribute amphetamine in violation of 21 U.S.C. §§841(a)(1) and 846. Both Appellants filed timely notices of appeal and assign several points of error. We now affirm.

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

*Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

FACTS

These companion appeals arise out of a foiled scheme to manufacture and distribute amphetamine in central Texas. Beginning in September of 1988, law enforcement officials began an investigation into a drug distribution network allegedly headed by Mike Wayne Royals. At defendants' trial, the Government argued that Royals was the leader of a drug organization that involved approximately twenty-six (26) individuals, including both Appellants. A key figure in this organization was Joseph Taylor Markhum. The evidence at trial disclosed that Appellant Reyes and Markhum were partners in the distribution of amphetamine. Likewise, from the latter part of 1990 until mid-1991, Markhum and Appellant Devers were partners in amphetamine distribution. Markhum eventually refused to deal with either Reyes or Devers because of drug deals gone sour.

In August of 1990, Waco police executed a search warrant at 2711 Summer Street, where Reyes rented a room from his mother. The search uncovered drug trafficking paraphernalia, including syringes, spoons, plastic bags, an electronic and triple-beam scale, a police radio scanner, drug ledgers, and a .38 caliber pistol and loaded clip. The police also discovered a surveillance camera mounted on the garage of the residence and focused on the driveway. The camera's monitor was located in Reyes' bedroom. In November of 1990, Waco police executed a second search warrant at 2711 Summer Street and discovered additional evidence of Appellant's involvement in the distribution of amphetamine. On

July 26, 1991, Waco police executed a search warrant at the mobile home residence of Appellant Devers and discovered a .45 semiautomatic pistol, loaded clips, ammunition, a digital scale, vials containing methamphetamine, and several notations regarding drug transactions.

1. COCONSPIRATORS' CONVICTIONS

Devers argues that evidence that nontestifying coconspirators had pleaded guilty was improperly brought before the jury and constitutes plain error under U.S. v. Leach, 918 F.2d 464 (5th Cir. 1990). Devers further argues that evidence that Jimmy Dean Saulters and Markhum, testifying coconspirators, had pleaded guilty was admitted without an immediate limiting instruction and therefore also constitutes plain error.

Officer Wilkerson, the prosecution's first witness, testified on direct examination that approximately twenty-six persons were involved in the amphetamine distribution conspiracy and that thirteen persons had been named in the indictment. The prosecution elicited from Wilkerson no testimony regarding the disposition of any of the coconspirators' cases. Afterward however, counsel for Reyes, while cross-examining Wilkerson, injected into the trial the information regarding the coconspirators' guilty pleas.[2] Appellant Devers made no objection and requested no limiting instruction.

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[2] The following exchange took place between Wilkerson and Reyes' counsel:

(counsel): Okay. And the rest of them have pled guilty or gone on doing their thing, is that right?

(Wilkerson): I believe so, yes, sir.

"Our precedents have made it abundantly clear that evidence about the conviction of a co-conspirator is not admissible as substantive proof of the guilt of a defendant." United States v. Handly, 591 F.2d 1125, 1128 (5th Cir. 1979). Although reference to such convictions by the prosecutor may constitute plain error, "a defendant will not be heard to complain of its admission when he instigates such admission, or attempts to exploit the evidence by frequent, pointed, and direct references to the coconspirator's guilty plea." Leach, at 467.

To determine whether plain error exists, this Court considers such factors as "the presence or absence of a limiting instruction, proper evidentiary purpose for introduction of the guilty plea, improper emphasis or use of the plea as substantive evidence, and whether the introduction was invited by defense counsel." Id. Here, the prejudicial information was not elicited by the prosecution but rather by Devers' co-defendant. This is a significant distinction, at least in the plain error analysis, especially since there is no suggestion of any antagonism or conflicting defenses between the two defendants. Further, the reference to other defendants' pleading guilty or otherwise having "gone on doing their thing" leaves open an inference that some pleaded guilty while others were discharged without liability, lessening any prejudicial effects from the comment. Moreover, the district court properly cautioned the jury in its charge that the convictions of witnesses "have been brought to your attention *only* because you may wish to consider them when you decide whether you

believe the witness's testimony." (emphasis added) The district court also instructed the jury that "the fact that an accomplice has entered a plea of guilty to the offense charged is not evidence, in and of itself, of the guilt of any other person."[3] These instructions sufficiently cautioned the jury that other defendants' guilty pleas should not create an inference of guilt against the defendants on trial. United States v. Borchardt, 698 F.2d 697, 701 (5th Cir. 1983). Although it might have been preferable to have also cautioned the jury at the moment the alledgedly prejudicial information was introduced, such a contemporaneous instruction is not absolutely required. Id. at 701 (cautionary instruction appears to have been given in general charge); cf., United States v. Abravaya, 616 F.2d 250, 251-52 (5th Cir. 1980) (no plain error in trial judge's instructions to jury at end of trial which included repeated references to coconspirators' guilty pleas); United States v. Baete, 414 F.2d 782, 784 (5th Cir. 1969) ("a clear and strong cautionary instruction should be deemed sufficiently curative"). Finally, there is absolutely no indication that the prosecution attempted to use the guilty plea of any other indicted coconspirator to create an inference of Devers'

[3] Devers also argues that this instruction is erroneous because it implies that a plea of guilty *is* evidence of another's guilt when considered with other evidence. This identical instruction has been previously approved by this Court in United States v. Abravaya, 616 F.2d 250, 251-52 (5th Cir. 1980), and is found in this Circuit's Pattern Jury Instructions at §1.16 (West 1990). While Devers' argument has superficial semantical appeal, in the absence of any objection it clearly does not constitute plain error.

guilt. Leach, at 467. We conclude that the brief mention of guilty pleas by nontestifying coconspirators, under the circumstances of this case, was not plain error.

Devers also argues that the trial court committed plain error in connection with the mention of the guilty pleas entered by testifying coconspirators Saulters and Markhum. The prosecution, as well as Devers and Reyes, elicited the fact of the guilty pleas by Saulters and Markhum during questioning as to their plea bargains with the government. Devers complains only that no limiting instruction concerning these pleas was immediately given by the district court, even in the absence of any request by Devers or anyone else. The trial court's cautionary instructions in its final charge were sufficient to avoid plain error in this regard.

2. JURY INSTRUCTIONS

Devers next argues that the trial court committed plain error in failing to instruct the jury that it must unanimously find him guilty of "one particular conspiracy." The case went to trial on a Second Superseding Indictment. Count One described only one conspiracy, allegedly involving both defendants and others named and unnamed, with only one object, namely to distribute amphetamines. The district court instructed the jury on each count and told the jury that its verdict must be unanimous.

Devers' actual contention is that, despite the allegation of only one conspiracy, the evidence showed the existence of two separate conspiracies. Specifically, Devers contends that the evidence showed a conspiracy between himself and Markhum that began

in late 1990 and ended in May 1991, and thereafter, beginning in June 1991 and ending three months later, a separate conspiracy between himself and Saulters. Devers argues that the trial court committed plain error by failing to instruct the jury that it must unanimously agree on one or the other of these two conspiracies.

Contrary to Devers' assertions, the evidence at trial established one conspiracy that embraced, among others, Devers, Markhum, and Saulters. Devers was involved in the purchase and sale of amphetamine with Saulters and Markhum simultaneously. The evidence disclosed that between late 1990 and May or June of 1991, Devers and Markhum were partners in the distribution of amphetamine. Markhum testified extensively to providing Devers with the drug. In June of 1991, Devers and Saulters moved in together at 3030 Cole Street in Waco, Texas. Saulters testified that from that time until about three months later, he and Devers sold amphetamine together. Saulters further testified that he received the amphetamine from Devers. Furthermore, Saulters testified to receiving, and Markhum testified to placing, telephone calls to the Cole Street residence intended for Devers. The overlapping participation of Devers, Saulters, and Markhum in the common scheme to market amphetamines is sufficient to establish that one overall conspiracy existed, as charged. Cf., United States v. Richerson, 833 F.2d 1147, 1152-55 (5th Cir. 1987) (describing factors determining whether a single or multiple conspiracies exist). Moreover, even assuming the evidence revealed the possible existence of multiple conspiracies, the trial court's

instructions to the jury provided the correct guidance.[4] United States v. Harris, 932 F.2d 1529, 1535 (5th Cir. 1991). Devers' claim of error in this regard is meritless. See, United States v. Devine, 934 F.2d 1325, 1340 (5th Cir. 1991).

Both Devers and Reyes claim other plain errors in the trial court's conspiracy charge. Each contends that the charge omitted an essential element of the offense, albeit in different respects. Among other things, the charge informed the jury that, to convict of conspiracy, the government must prove that two or more persons in some way came to a mutual understanding to try to accomplish an unlawful plan as charged in the indictment, and that the defendant willfully became a member of "such conspiracy." Devers contends that proof that a defendant "willfully becomes a member" of the conspiracy is not the same as proof that he personally came to a mutual understanding with another person to commit the crime. The charge contained other language making it clear that guilt of a conspiracy requires knowing and willful participation in a criminal

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[4] The trial court instructed the jury as follows:

> In your consideration of the conspiracy offense as alleged in the indictment you should first determine, from all of the testimony and evidence in the case, whether or not the conspiracy existed as charged. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the defendant willfully became a member of such conspiracy.
> ...
> If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you find that some other conspiracy existed. If you find that a defendant was not a member of the conspiracy charged in the indictment, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

scheme.[5] Devers dismisses this language as "abstract statements" which merely suggest factors that might be considered by the jury but which nevertheless fail to contain the essential elements of the crime.

Reyes' complaint is equally technical. As previously indicated, the trial judge instructed the jury that the government must prove that the defendant "willfully" became a member of a conspiracy and later defined "willfully" to mean that the defendant acted voluntarily and purposely, with a specific intent to do something that the law forbids. Notwithstanding those instructions, along with the language quoted in footnote 4, Reyes nevertheless contends that the instructions did not require the government to prove that Reyes "knew of the conspiracy."

The court easily concludes that the conspiracy instructions adequately and sufficiently covered the elements of the offense and were substantially similar to those approved by this Court in

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[5]One may become a member of a conspiracy without knowing all of the details of the unlawful scheme or the identities of all the other alleged conspirators. If the defendant understands the unlawful nature of the plan or scheme, and knowingly and willfully joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part....So, if another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other person just as though he had committed the acts or engaged in such conduct. Notice, however, that before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

United States v. Casto, 889 F.2d 562, 565-66 (5th Cir. 1989). It is doubtful that the alleged defects noted by Devers and Reyes constituted error of any kind; they clearly are not plain error.

3. INEFFECTIVE ASSISTANCE

Devers argues that his trial counsel was ineffective in several respects: agreeing to accept a verdict of less than twelve jurors in the event not more than two became unable to serve; erroneously permitting the introduction of highly prejudicial information; failing to request the court to instruct the jury in several respects; and failing to present an adequate defense.

"In this circuit the general rule is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal unless it has first been raised before the district court." United States v. Kinsey, 917 F.2d 181, 182 (5th Cir. 1990). An exception to this general rule is made only where the record is sufficiently developed with respect to the merits of the claim. Id.; United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991) (substantial details of attorney's conduct required to resolve claim on direct appeal). Because the record has not been developed with respect to the merits of this claim, we decline to resolve it on direct appeal. Appellant is entitled to pursue his claim for ineffective assistance of counsel in accord with 28 U.S.C. §2255.

4. PREVIOUS DRUG CONVICTION

Reyes argues that the trial court erred by admitting evidence of a state conviction for possession of methamphetamine without conducting a hearing outside the jury's presence, or articulating

reasons for admitting the evidence under Fed.R.Evid. 404(b), or giving the jury a simultaneous limiting instruction. Reyes asks for a remand so that the trial court may reconsider the admissibility question.

In his opening statement, the prosecutor made reference to Reyes' conviction; no objection was made, nor was a limiting instruction requested. Again, during its re-direct examination of Officer Dieterich, the prosecution made reference to Reyes' state conviction; no objection was made, nor was a limiting instruction requested. Not until the government offered into evidence a copy of the state court judgment did Reyes object on the grounds that the evidence was inadmissable under Fed.R.Evid. 404(b) and was irrelevant, immaterial, and prejudicial. The district court, without explanation, admitted the judgment over Reyes' objection. Reyes did not specifically request an on-the-record balancing of the probative value and prejudicial effect of the prior conviction, nor did he request a contemporaneous limiting instruction. Nevertheless he now contends that the court should have conducted such a balancing on the record and should have articulated on the record its reasons for admitting the evidence. He further appears to suggest that, because he did not testify at his trial, there was no legitimate reason to admit evidence of the conviction.

The government contends on appeal that the evidence of Reyes' prior conviction was not extrinsic but rather intrinsic, claiming that the state court conviction was "inextricably intertwined" with other evidence of the crimes charged in the federal indictment.

United States v. Randall, 887 F.2d 1262, 1268 (5th Cir. 1989). While this argument is not implausible based on the record, it is not the theory employed at the trial. In his closing instructions, the trial court clearly treated this evidence as extrinsic, telling the jury that it was admitted for limited purposes such as determining Reyes' state of mind, knowledge, or intent.[6] We will analyze the evidence accordingly.

Regardless of whether Reyes testified at trial, the mere entry of a not-guilty plea in a conspiracy case sufficiently raises the issue of intent to justify the admissibility of extrinsic offense evidence. United States v. Gordon, 780 F.2d 1165, 1174 (5th Cir. 1986). The requirement that the court articulate on the record its balancing of the probative value and prejudicial effect of extrinsic evidence generally must be triggered by a request from the affected party. United States v. Zabaneh, 837 F.2d 1249, 1264 (5th Cir. 1988). Reyes did not specifically make such a request at

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[6]The complete instruction was:

> During the course of this trial, you have heard evidence that Defendant Sam Larry Reyes was previously convicted of an offense similar to the one charged in this case. You must not consider this evidence in deciding if he committed any act charged in the indictment. However, you may consider this evidence for other, very limited purposes. You may only consider this evidence to determine: Whether he had the state of mind, knowledge or intent necessary to commit the crime charged in the indictment; or whether he had a motive or the opportunity to commit the crime charged in the indictment; or whether he acted according to a plan or made preparation; or whether he committed an act for which he is on trial by mistake or accident. These are the limited purposes for which evidence of the other conviction may be considered.

the time the conviction was offered into evidence. He did, however, object to the evidence and had earlier filed a motion in limine asking that evidence of other convictions not be mentioned without a prior determination of their admissibility outside the presence of the jury. Under these circumstances, the better course undoubtedly would have been for the trial judge to articulate on the record his reasons for admitting the evidence. Considering the similarity of intent between the state and federal cases and their close temporal proximity, there is little doubt that the state conviction would be highly probative of intent. See, United States v. Devine, 934 F.2d 1325, 1346 (5th Cir. 1991). We also note that the evidence against Reyes was otherwise overwhelming; that the prosecution made only passing reference to the state conviction and never attempted to persuade the jury to base its verdict upon that fact; and that the jury already knew from other evidence about the discovery in Reyes' bedroom of the amphetamine which formed the basis of the state court conviction. We are convinced under these circumstances that any error in the admissibility of this conviction was harmless beyond a reasonable doubt. See United States v. Williams, 957 F.2d 1238, 1244 (5th Cir. 1992).

5. CHAIN OF CUSTODY

Reyes next argues that the trial court erroneously admitted into evidence drugs seized and the laboratory results of those drugs where the proper chain of custody was not established. This claim is unsupported by argument or citation to supporting authority and can therefore be considered abandoned. Fed.R.App.P.

28(a)(4); United States v. Lindell, 881 F.2d 1313, 1325 (5th Cir. 1989). In any event, we have previously held, assuming a *prima facie* showing of authenticity is made, which Reyes does not dispute, "[w]eaknesses in the chain of custody go to the weight--not the admissibility--of evidence." United States v. Logan, 949 F.2d 1370, 1378 (5th Cir. 1991).

6. DOUBLE JEOPARDY

Reyes next contends that the trial court erred in considering, during sentencing, drugs seized at his residence on August 29, 1990. Reyes contends that he has already been convicted and sentenced in state court for the drugs seized and is therefore being punished twice for the same offense in violation of the Fifth Amendment's proscription against double jeopardy.

As a result of the August 29, 1990 search of Reyes' residence, he was convicted in state court for possession of methamphetamine and was sentenced to twelve years in state prison. The drugs seized during this search and made the basis of Reyes' state conviction were included in the presentence report's drug amount calculation in this case. Under the dual sovereignty doctrine, the federal government may prosecute and punish a defendant for a federal offense even after he has been convicted of a state offense based upon the same conduct. Abbate v. United States, 359 U.S. 193, 194, 79 S.Ct. 666, 670 (1959). Therefore, Reyes' double jeopardy argument is meritless.

7. SENTENCING

Appellants charge that the trial court erroneously calculated

their sentences under the Sentencing Guidelines. Both defendants object to receiving a two-level increase in their base offense level under § 2D1.1(b)(1) of the Federal Sentencing Guidelines for possessing a firearm. Reyes argues that the adjustment was improper because the weapon was not loaded at the time of its seizure.

During the search of August 1990, a .38 caliber pistol was seized from Reyes' bedroom, along with a loaded clip found directly across the room in a dresser drawer. Reyes' argument that § 2D1.1(b)(1) is inapplicable because the weapon was not loaded when seized is meritless. See, United States v. Villarreal, 920 F.2d 1218, 1221-22 (5th Cir. 1991) (no requirement weapon be loaded); United States v. Suarez, 911 F.2d 1016, 1018-19 (5th Cir. 1990) (pistol and loaded clip warranted application of § 2D1.1(b)(1)); see also, U.S.S.G. § 1B1.1 (defining firearm as "any weapon...which...may readily be converted to expel a projectile by the action of an explosive").

Devers' complaint is that the district court failed to make specific factual findings to support the § 2D1.1(b)(1) adjustment. At sentencing, Devers conceded that in the July 1991 search, a pistol was found at the headboard of his bed, and that a trace of methamphetamine was found in a briefcase belonging to Saulters located in the living room of the trailer home. However, he disputed any connection between the firearm and drug trafficking activity. At sentencing, during the discussion of this issue, the prosecutor reminded the district court of Saulters' trial testimony

that drug transactions regularly took place at the trailer and that the briefcase in question was also used by Devers. The prosecutor further argued that the presentence report (PSR) indicated that drug ledgers and paraphernalia were found in the living room of the trailer, so that it was not clearly improbable that the weapon was connected with the offense. Devers did not dispute any of these facts. The trial court thereafter overruled Devers' objection to the §2D1.1(b)(1) upward adjustment.

While we review application of the guidelines fully for errors of law, the district court's finding of facts must be upheld on appeal unless clearly erroneous. 18 U.S.C. §3742(d); United States v. Eastland, 989 F.2d 760, 769 (5th Cir. 1993). A district court's application of the § 2D1.1(b)(1) specific offense characteristic is a factual determination reviewed for clear error. United States v. Devine, 934 F.2d 1325, 1339 (5th Cir. 1992). Guideline §2D1.1(b)(1) directs sentencing courts to increase the offense level for drug offenses by two points if a firearm or other dangerous weapon was possessed.[7] The commentary provides that "[t]he 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.

Devers complains that the trial court made no findings of

[7] The deletion of the language "during the commission of the offense" from § 2D1.1(b)(1) was done to clarify that possession during conduct related to the offense of conviction, though not the subject of conviction, is sufficient to justify enhancement. See, United States v. Eastland, 989 F.2d 760, 769 (5th Cir. 1993); United States v. Paulk, 917 F.2d 879, 882 (5th Cir. 1990).

facts to support overruling his objection to the firearm adjustment. However, from the exchange between the district judge and the prosecutor, it is clear that the district court found sufficient evidence of the presence of drug activity at the trailer home to justify the adjustment. As we stated in United States v. Sherbak, 950 F.2d 1095, 1099-1100 (5th Cir. 1992):

> While [defendant] did make objections to the PSR's recommendation...he did not put any particular facts in dispute.... He offered no rebuttal evidence to refute any of the facts as set forth in the PSR. ... When a defendant objects to his PSR but offers no rebuttal evidence to refute the facts, the district court is free to adopt the facts in the PSR without further inquiry. By assigning [defendant] an offense level of 28, the court obviously adopted the finding of the PSR.... No further statement by the court was necessary for an appellate court to determine the district court's findings on this issue. (citations omitted)

Because none of the facts that clearly formed the basis for the trial court's sentencing decision was disputed, explicit factual findings were unnecessary. United States v. Goodman, 914 F.2d 696, 697 n.4 (5th Cir. 1990). We therefore conclude that the district court's application of §2D1.1(b)(1) was not clearly erroneous.

Devers next argues that the trial court erroneously considered unreliable hearsay information in calculating the total amount of contraband attributable to him. In his objections to the PSR, Devers challenged the drug quantities attributed to him by various confidential informants, including Markhum and Saulters. Neither Devers nor the government called Markhum or Saulters to testify at the sentencing hearing. The government relied solely on the testimony of Officer Wilkerson, who testified to statements made to him by Saulters and Markhum. On appeal, Devers maintains that the

trial court's findings as to the amount of amphetamine attributable to him were not supported by competent evidence.

Devers' complaint is apparently based on the hearsay nature of the evidence considered by the trial court in reaching its sentencing decision. However,

> [i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. Any information may be considered so long as it has sufficient indicia of reliability to support its probable accuracy. Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means. Unreliable allegations shall not be considered.

Sentencing Guidelines §6A1.3 commentary (citations omitted); United States v. Cuellar-Flores, 891 F.2d 92, 93 (5th Cir. 1989). Both Markhum and Saulters had testified extensively at trial regarding the number and size of drug transactions in which Devers was involved. Officer Wilkerson's sentencing testimony merely summarized this and other evidence. This evidence bore sufficient indicia of reliability to support the trial court's sentencing decision. The record also discloses sufficient reasons for nondisclosure of the identity of confidential informants, namely their personal safety, and adequate corroboration of their declarations. For the foregoing reasons, the trial court's findings regarding the amount of drug attributable to Devers are not clearly erroneous.

Reyes complains that the district court used an incorrect quantity of amphetamine to determine the applicable sentencing guideline range. As stated above, the district court's factual

findings, including the quantity of drugs employed to calculate the sentencing range, will not be disturbed on appeal unless they are clearly erroneous. Eastland, at 769; United States v. Michael, 894 F.2d 1457, 1459 (5th Cir. 1990); United States v. Pierce, 893 F.2d 669, 678 (5th Cir. 1990).

In his objections to the PSR, Reyes argued that .66 grams of amphetamine found on his brother and 1 gram of amphetamine seized from a auto body shop owned by a Tony Garcia were improperly attributed to him. The district court sustained these objections. The total amount of amphetamine attributable to Reyes, 4,217.6 grams, was calculated by the following amounts and sources:

113.5 grams amphetamine confidential informant
10.5 grams amphetamine confidential informant
3640 grams amphetamine Sandra Shook (debriefing)
453.6 grams amphetamine Sandra Shook (debriefing)

At the sentencing hearing, the probation officer testified that Sandra Shook informed him that she purchased at least one-half ounce of (meth)amphetamine from Reyes daily for approximately one year beginning in 1988. The officer also testified that Shook informed him that she had seen Reyes in possession of approximately 1-2 pounds of (meth)amphetamine. Reyes objected that Shook's statements were hearsay and untrue and that the use of such evidence violated his constitutional rights. The district court overruled Reyes' objection. He noted that Shook had testified at trial and expressly found the evidence received from her reliable. As far as the amounts attributed to confidential informants, the district court stated these would not change the applicable range

even if deducted and therefore overruled Reyes' objection.

Reyes raises the same basic objections on appeal. As previously noted, at sentencing a district court may consider reliable hearsay evidence. Cuellar-Flores, supra. The defendant bears the burden of establishing that the information on which the district court relies is materially untrue, inaccurate, or unreliable. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

The probation officer's account of Shook's information generally tracked her trial testimony. Reyes' general objection to the reliability of the presentence information is insufficient to carry his burden of establishing its material untruth or untrustworthiness. Id. Reyes' further argument that, in order to be considered at sentencing, the drugs had to be seized and analyzed is meritless. Id. We conclude that the district court's consideration of 3,640 grams and 453.6 grams of amphetamine based on the Shook information was not clearly erroneous. With respect to drug amounts (124 grams) attributed to Reyes by confidential informants, he has failed to establish any prejudice. If these 124 grams were subtracted from the amount considered by the district court, the same base offense level would apply.[8] Therefore, even assuming that the district court's inclusion of these amounts was erroneous, no change in Reyes' sentence would result, and therefore

[8] Base offense level of 30 applies to at least 3.5 kilograms but less than 5 kilograms of cocaine or other schedule I or II stimulant. See, U.S.S.G. § 2D1.1(c)(7) and comment n.10.

remand for resentencing is not required. United States v. Salazar, 961 F.2d 62, 64 (5th Cir. 1992); United States v. Harris, 932 F.2d 1529, 1539 (5th Cir. 1991).

CONCLUSION

For the reasons explained above, the convictions and sentences of Appellants are AFFIRMED.