IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2200

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

OSCAR FUENTES, a/k/a Camarron,
EDUARDO ORTIZ CAPISTRAN, a/k/a La Morena,
JUAN DAVID GARCIA, a/k/a Juan Bananas,
J. MATILDE BARRIOS, and
JOSE BERNARDO NIETO,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(CR-H-92-111-04)

(October 4, 1994)

Before POLITZ, Chief Judge, SMITH, Circuit Judge, and BERRIGAN,[*] District Judge.

JERRY E. SMITH, Circuit Judge:[**]

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[*] District Judge of the Eastern District of Louisiana, 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Appellants were found guilty of participating in a large cocaine trafficking and money laundering organization that was directed from Mexico. The cocaine originated in Colombia and was transported to Matamoros, Mexico, before being shipped into the United States. The money from sales in the United States was transported back to Mexico.

Juan Abrego Garcia was the leader of a large cocaine organization located in Mexico. Sometime in the late 1980's, one of the men just below Abrego Garcia in the organization's hierarchy, Elias Garcia-Garcia, a/k/a El Profe ("El Profe"), recruited several individuals to traffic cocaine for the organization. El Profe's branch of the organization worked out of Matamoros, Mexico. Three of those recruited were Roger Eloy Banda ("Banda"), Francisco Javier Narvaez ("Narvaez"), and Jaime Rivas-Gonzales ("Rivas"). Banda, Rivas, and Narvaez agreed to transport cocaine, which had arrived from the Matamoros group, through the Rio Grande Valley to Houston and other parts of the United States. Oscar Fuentes, a/k/a Camarron ("Fuentes"), was charged by Banda with transporting cocaine that he had picked up at the United States-Mexico border to Narvaez's garage in Harlingen, Texas, for storage. El Profe would contact Rivas and Fuentes when a shipment was arriving from Mexico.

In the spring of 1989, the group decided to discontinue the use of Narvaez's garage as the storage point. Jose Bernardo Nieto ("Nieto") was instructed to move the cocaine that was currently being stored in the garage. He notified Rivas that Eduardo Ortiz

Capistran, a/k/a "La Morena" ("Capistran"), would pick up the cocaine from Narvaez. Capistran moved the cocaine to a warehouse in Brownsville that Nieto had arranged for. The cocaine was eventually transported by J. Matilde Barrios ("Barrios") and Raciel Contreras ("Contreras") to Houston. The Brownsville warehouse replaced Narvaez's garage as an initial storage location.

In January of 1989, Narvaez purchased property ("the ranch") on Bass Boulevard in Harlingen, near the border with Mexico. The ranch became an initial stash location along with Nieto's warehouse in Brownsville. When cocaine arrived from Mexico, Narvaez or Rivas would take Alfonso Tristan Gonzalez ("Alfonso"), who had moved into the ranch, to a field about two miles from the ranch. Fuentes would pick him up, and the two would meet a truck filled with cocaine. Alfonso then would drive to the ranch when advised that no police were around. On other occasions, the truck would drive directly to the ranch.

Alfonso would record the amounts of cocaine that were unloaded at the ranch. After notifying El Profe that the shipment had been received, Alfonso or Cayetano Salazar, a/k/a Tano ("Salazar"), would prepare the cocaine for further transport. The cocaine would be shipped from the ranch to Nieto's Brownsville machine shop (Often cocaine was packaged in metal boxes made in Nieto's machine shop.) or to the warehouse in Brownsville. Drivers from the Brownsville location would check into a hotel in Harlingen, then deliver the cocaine to points in Houston.

Drivers to Houston included Juan David Garcia, a/k/a Juan

Bananas ("Garcia"), Barrios, Contreras and Leonel Gonzalez, a/k/a None ("Gonzalez"). Once the cocaine reached Houston, Israel Pena, a/k/a Querrequ ("Pena"), was in charge of off-loading. Off-load sites included two nurseries owned by Jeff Landon, a/k/a El Indio ("Landon"), the Rapid Truck Repair shop, and an old house in Houston. Cocaine eventually was delivered from these sites to Federico Munguia, a/k/a Vela or Lira ("Munguia"), at a house on Krenek Road in Crosby, Texas.

Carlos Jasso ("Jasso"), who was Landon's step-son and testified at trial, was employed at the nursery, where he observed cocaine being unloaded by Garcia and Barrios. The trailers generally contained plants and trees that masked the cocaine that was hidden in a secret compartment. Rivas and Barrios would rent tractor-trailers to ship the cocaine to Houston. Truck rental agreements signed by Barrios were presented at trial.

Rivas and Banda generally were present when a tractor-trailer filled with cocaine arrived in Houston. Jasso said that the cocaine was generally bundled in green duffle bags, white sugar sacks, and metal boxes. Raul Zuno, a/k/a Poncho ("Zuno"), and Carlos Elizondo, both of whom worked for Munguia, eventually would arrive with vans to transport the cocaine out of the nursery.

In September 1988, Tomas Guajardo arranged for a lease in Zuno's name for a ranch on Miller-Wilson Road in Crosby that was used as a distribution center for cocaine leaving the stash locations in Houston. In addition, Zuno also delivered cocaine to the Miller-Wilson ranch directly from Lake Jackson and San Antonio.

The Lake Jackson cocaine was picked up in nearby Clute, Texas, from Capistan and/or Nieto. Hotel records indicate that Capistran and Nieto often stayed in Clute. Zuno eventually claimed that about 16,000 kilos of cocaine were transported to the Miller-Wilson ranch.

Much of the cocaine eventually was distributed in New York, where Julio Aranda, a/k/a Chano or Chanito, "El Gringo," directed the operation. William Allan Hoffman ("Hoffman") would drive cocaine from Texas to New York and then return with boxes of cash. On one occasion Jasso, Banda, and Gonzalez transported money from a business in Houston to the ranch in Harlingen, where Rivas, Poncho, Galan, Narvaez, and Alfonso were waiting. Jasso also delivered money, on occasion, to Banda's house in McAllen, Texas. Alfonso's van was used to deliver the money to Mexico. Computer data from the border with Mexico indicated that Alfonso's vehicle crossed the border from Mexico back into the United States on numerous occasions.

Between November 1988 and January 1989, police in Queens, New York, began an independent drug investigation. A search at a Zoom Furniture warehouse yielded $18.3 million in cash, MAC-10 machine guns, and vehicles with hidden compartments. A red car also was seized at the warehouse. The driver, Carlos Restrepo, had a Houston driver's license. Records of a mobile phone located in the car reflected calls to the machine shop in Brownsville and the hotel in Harlingen.

Also in January 1989, the IRS began investigating reports that

a house in Houston at 14227 Langbourne was being used as a money stash location. A search of the garbage at this location yielded a motor vehicle registration for a car registered to Zoom Furniture. The vehicle described in the registration was identical to one of the vehicles seized at the Zoom Furniture warehouse in New York. Agents were unaware, however, of the New York drug investigation. Subsequently, search warrants were issued for the Langbourne address, Rapid Truck Repair, and an apartment in Houston. All three locations were suspected of being stash locations for money. Cash was seized at Langbourne, along with mobile phones that records indicate were used to call various phone numbers connected to the organization in New York. Moreover, a van with hidden compartments was seized at Rapid Truck Repair and was found to contain in excess of $4 million in cash and traces of cocaine.

On March 14, 1989, a tractor-trailer registered to Jorge Hernandez, but purchased by Rivas, was stopped at the Sarita, Texas, border checkpoint at about 8:15 p.m. Agents discovered 825 kilograms of cocaine in a hidden compartment in the otherwise empty truck. The cocaine was in the process of being moved from Nieto's warehouse after initially being located at the Bass Boulevard ranch. When the truck was stopped, Contreras, who was the driver, and Garcia were both arrested. Garcia claimed to be a hitchhiker.

Jasso later testified that Garcia had accompanied Contreras because Garcia allegedly knew a member of the border patrol. Surveillance of Garcia on March 14 contradicted his story.

Moreover, hotel records indicate that he and Contreras were registered at the Seville Inn in Harlingen just prior to the Sarita checkpoint seizure. Banda and Jasso attempted to secure an attorney on Contreras's behalf. An attorney was paid $14,000 in cash to represent Contreras. Narvaez, Alfonso, and Barrios notified Contreras's wife that her husband had received an attorney and that he should keep quiet.

On August 28, 1989, FBI agents received information that an individual was driving from Dallas to Houston to pick up drugs. Agents observed a pickup driven by Hector Argueillen proceed to the residence on Krenek in Crosby. The truck later was stopped with 28 kilos of cocaine. Police returned to the residence in Crosby, where it appeared that the occupants were destroying evidence. Police seized 450 kilos of cocaine, two guns, a spiral notebook, lists of telephone numbers, and empty U-haul boxes.

On September 18, agents executed a warrant at a residence on Arrowrock in Houston to which Hoffman had delivered cocaine from Dallas. They seized 160 kilos of cocaine packaged in U-haul boxes, drug ledgers, two guns, and various other items. After the Arrowrock location was raided, El Profe, Rivas, Nieto, and others met in Matamoros. Nieto then secured a warehouse on Almeda-Genoa Road in Houston for cocaine deliveries.

Rivas's last delivery to Landon occurred on September 22, 1989, at one of the nurseries. Landon took 645 kilograms of cocaine to a house in Houston, where the drugs were seized by police. Rivas was stopped by police after he left the nursery.

When the nursery was searched, police found duffle bags (which the organization had used to transport cocaine) and guns. Rivas became a key prosecution witness at trial.

In late September and early October 1989, Alfonso was preparing several shipments from Mexico at the ranch on Bass Boulevard. Martin Cabrera ("Cabrera") had begun working for Alfonso early in October. When Cabrera was arrested on October 4 for delivering cocaine to an undercover officer, he became cooperative and informed officials of the ranch stash house.

A search warrant was executed at the ranch on October 4, 1989. Nine tons of cocaine were found bundled in duffle bags, sugar sacks, and boxes. Notebooks, ledgers, and phone lists were found; agents also located a hidden cellar underneath a chicken coop. Alfonso and several others were arrested. Agents searched Rivas's house and found truck rental receipts and notations that Rivas said were lists of cocaine payments. Barrios's name appeared on one of the lists.

FBI and Houston police observed the Almeda-Genoa warehouse and an adjacent house from October 23 to November 6, 1989, pursuant to information that marihuana would be delivered there. The buildings were connected by a foot trail. On November 6, a tractor-trailer arriving at the property went into a ditch. Police obtained consent to search the trailer and found 666.6 kilograms of cocaine in metal boxes. As police approached the adjacent house, Capistran attempted to escape but was detained; another man was found in the house as well. Men were also found in the warehouse.

Police found duffle bags and a U-haul box in the house and a car parked on the premises. Capistran said that the car belonged to a friend and then gave police permission to search the car. The car was revealed to be registered in the name of Robert Nieto (Nieto's father). Nieto apparently purchased the car and had registered it in his father's name. In addition, traces of marihuana were found in the trunk.

On November 8, 1989, a DEA agent, working undercover, was introduced to Nieto. The agent claimed to be a transporter of contraband. Nieto said that he had 500-1,000 kilograms for transport to New York. Nieto and Bogdan reached an agreement that was eventually canceled by Nieto, who eventually pleaded guilty to conspiracy charges stemming from this incident in a separate proceeding from this case in McAllen, Texas. In April 1990, raids by agents at various locations connected with the organization yielded more cash, lists of phone numbers connected to the organization, a drug ledger, and other items.

II.

The original indictment in this case came down on May 4, 1992. Thirteen people, including the five appellants, were named in a variety of counts. A superseding indictment was filed on December 8, 1992, after several of the co-defendants pleaded guilty. Fuentes, Capistran, Garcia, and Barrios were indicted for conspiracy to possess cocaine with intent to distribute under 21 U.S.C. §§ 841 and 846 and aiding and abetting a March 14, 1989,

possession of cocaine with intent to distribute under 21 U.S.C. § 841 and 18 U.S.C. § 2. Fuentes also was indicted for aiding and abetting the possession of cocaine with intent to distribute on August 28, 1989, and October 4, 1989, under 21 U.S.C. § 841 and 18 U.S.C. § 2. Capistran and Nieto were indicted for aiding and abetting a November 6, 1989, possession of cocaine with intent to distribute under 21 U.S.C. § 841 and 18 U.S.C. § 2. Finally, Fuentes was indicted for conspiracy to import cocaine under 21 U.S.C. §§ 952, 960, and 963.

The jury convicted the defendants on all counts except for the conspiracy to import count against Fuentes. Each defendant received a life term for each count followed by a total of five years of supervised release. Each defendant also was ordered to pay the special assessment of $50 per count. The defendants raise a variety of issues on appeal.

III.

Each defendant argues that the evidence was insufficient to support his conviction on any of the counts. We review all evidence, together with all credibility choices and inferences, in the light most favorable to the verdict. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Maseratti, 1 F.3d 330, 337 (5th Cir. 1993), cert. denied, 114 S. Ct. 1096, and cert. denied, 114 S. Ct. 1552 (1994), petition for cert. filed (U.S. Aug. 18, 1994) (No. 94-5666). The question is whether a rational trier of fact could have found that the evidence established guilt beyond a

reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). This court does not weigh evidence or assess the credibility of witnesses. United States v. Varca, 896 F.2d 900, 905 (5th Cir.), cert. denied, 498 U.S. 878 (1990).

In order to prove guilt of a conspiracy to possess cocaine with the intent to distribute under § 846, the government must prove that (1) there was an agreement between two or more persons to possess controlled substances with intent to distribute; (2) each defendant knew of the conspiracy and intended to join; and (3) each defendant voluntarily participated in the conspiracy. United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989). The jury may infer the existence of an agreement from a defendant's concert of action with others. United States v. Martinez, 975 F.2d 159, 162 (5th Cir. 1992), cert. denied, 113 S. Ct. 1346 (1993). The jury also may infer any element from circumstantial evidence. Lechuga, 888 F.2d at 1476. In addition, "[c]ircumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." Id. (quoting Coggeshall v. United States (The Slavers, Reindeer), 69 U.S. (2 Wall.) 383 (1865)).

In order to establish guilt of specific instances of possession with intent to distribute under 21 U.S.C. § 841, the government must prove that the defendant knowingly possessed a controlled substance with intent to distribute. United States v. Ramirez, 963 F.2d 693, 701 (5th Cir.), cert. denied, 113 S. Ct. 388 (1992).

Possession may be actual or constructive. United States v. Ivy, 973 F.2d 1184, 1188 (5th cir. 1992), cert. denied, 113 S. Ct. 1826 (1993). Possession also may be joint among several persons. United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989), cert. denied, 493 U.S. 1087, and cert. denied, 496 U.S. 926 (1990). Intent to distribute may be inferred from the possession of a large amount of contraband. Ivy, 973 F.2d at 1188. Finally, a conspirator may be held liable for substantive offenses of a co-conspirator if the acts were reasonably foreseeable and done in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 647-48 (1946); Lechuga, 888 F.2d at 1478.

To establish aiding and abetting under § 2, the government must prove that the defendant (1) was associated with a criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed. United States v. Cartwright, 6 F.3d 294, 300 (5th Cir. 1993), petition for cert. filed (U.S. July 19, 1994) (No. 94-5410). A conviction for aiding and abetting the possession of a controlled substance with intent to distribute does not require that the defendant have actual or constructive possession of the drugs. United States v. Salazar, 958 F.2d 1285, 1292 (5th Cir.), cert. denied, 113 S. Ct. 2427 (1993). The conviction for aiding and abetting "merely requires that [defendant's] association and participation with the venture were in a way calculated to bring about that venture's success. Id. "Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction." United States v. Singh, 922 F.2d

1169, 1173 (5th Cir.), cert. denied, 500 U.S. 938, and cert. denied, 112 S. Ct. 260 (1991).

A.

Fuentes was convicted of one count of conspiracy to possess cocaine with intent to distribute and three counts of aiding and abetting a specific possession of cocaine with intent to distribute. He limits his attack on the conspiracy count and the October 4, 1989 (the Bass Boulevard ranch), aiding and abetting count to the credibility of Rivas and Alfonso, who testified at trial pursuant to plea agreements.

As we stated previously, we will not supplant the jury's determination of credibility with our own. Martinez, 975 F.2d at 161. A witness's testimony will not be declared incredible as a matter of law unless it is factually impossible. United States v. Velgar-Vivero, 8 F.3d 236, 240 n.11 (5th Cir. 1993), cert. denied, 114 S. Ct. 1865, and cert. denied, 114 S. Ct. 2715 (1994).

Rivas's and Tristan's stories were consistent with respect to Fuentes's role in the organization. Moreover, the uncorroborated testimony of an accomplice or co-conspirator can be sufficient to support a guilty verdict. United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993). Therefore, we reject Fuentes's challenge to the conspiracy count and the aiding and abetting count of October 4, 1989, as he has merely challenged the credibility of Rivas and Gonzales and not the factual possibility of their testimony.

With respect to the other two aiding and abetting counts, Fuentes argues that the evidence failed to link him to the contraband seized on March 14, 1989, at the Sarita checkpoint and August 28, 1989, at the Krenek Road house. The evidence showed that the organization possessed a large amount of contraband from which the jury could have inferred an intent to distribute. As we noted earlier, an aiding and abetting conviction does not require that the defendant have had actual or constructive possession of the controlled substances. Salazar, 958 F.2d at 1292. The government must show only that Fuentes's association and participation in the organization were undertaken to further the organization's success. Id.

The testimony of Rivas and Gonzales indicated that Fuentes was regularly charged with the collection and transportation of the contraband. Evidence indicated that El Profe would contact Rivas and Fuentes when a shipment of cocaine was en route from Matamoros to the Rio Grande Valley. Rivas would call Fuentes to verify that Fuentes knew the cocaine was coming. Fuentes would collect the cocaine on the U.S. side of the border and would transport it to Narvaez's garage for storage. Fuentes's phone records further corroborate his link to the organization. Defendant's participation in the venture was plainly established.

Furthermore, under Pinkerton, Fuentes is liable for the substantive offenses committed by his co-conspirators if the acts were in furtherance of the conspiracy and foreseeable. Both of the activities involved here were certainly foreseeable to Fuentes,

given his role in the organization and the extent of the organization's activities. The jury in this case was properly given a Pinkerton instruction. We conclude that the evidence presented was sufficient to support Fuentes's conviction on all counts.

B.

Capistran was convicted of conspiracy to possess cocaine with intent to distribute and of aiding and abetting possession of cocaine with intent to distribute, in conjunction with the Sarita checkpoint seizure on March 14, 1989, and the Almeda-Genoa warehouse seizure on November 6, 1989. The government has presented sufficient evidence to support the three convictions. Testimony indicated that Capistran was an instrumental part in the cocaine loads that were transported from Lake Jackson and San Antonio through Clute to Houston. Evidence also indicated that Capistran was involved in other trafficking activity for the organization.

Capistran claims that the government failed to link him directly to the Sarita and Almeda-Genoa seizures. Testimony from Rivas, which the jury was free to credit, indicated that Capistran indeed transported the cocaine from the Bass Boulevard ranch to a warehouse in Brownsville, where it was then loaded onto the truck that was stopped at the Sarita checkpoint.

Testimony also indicated that Capistran was on the scene of the seizure at the Almeda-Genoa warehouse and that he attempted to flee. Though he was detained and released, the jury was permitted

to draw an adverse inference from the incident. United States v. Williams, 775 F.2d 1295, 1300 (5th Cir. 1985), cert. denied, 475 U.S. 1089 (1986). Capistran's presence at the scene, combined with testimony that linked him to Nieto and the organization, plainly connected him to the Almeda-Genoa warehouse.

Even absent evidence linking Capistran to these specific seizures, there was sufficient evidence to support a finding that Capistran engaged in activities calculated to further the success of the organization. Salazar, 958 F.3d at 1292. The evidence was sufficient to uphold a jury verdict of guilty on all counts against Capistran.

C.

Barrios was convicted of one count of conspiracy to possess cocaine with intent to distribute. He admits that both Jasso and Rivas testified that they personally observed Barrios to be a driver of trucks shipping cocaine to distribution points in Houston, including Ursula's Nursery and Rapid Truck Repair. Barrios claims that the evidence, given Jasso's and Rivas's incentives to testify, at most established equal support to a theory of guilt as to a theory of innocence. Barrios contends that he never knew that he was transporting cocaine. Consequently, Barrios argues, his conviction must be reversed. See, e.g., Clark v. Procunier, 755 F.2d 394, 396 (5th Cir. 1985).

Again, the credibility of Jasso and Rivas was assessed by the jury at the trial. Their testimony indicated that Barrios

transported duffle bags, metal boxes, and white sacks filled with cocaine to the nursery, where he helped to unload them. All of these items were inconsistent with a legitimate nursery delivery. It was reasonable for the jury to conclude that Barrios was aware that any legitimate cargo mingled with the contraband served merely as a cover for the controlled substances. It was also permissible for the jury to use the fact that Barrios was entrusted with large amounts of contraband as evidence of his familiarity with the organization. See, e.g., United States v. Gallo, 927 F.2d 815, 821 (5th Cir. 1991).

Rivas, in conjunction with the presentation of a written record, testified that Barrios was paid $15,000 for his involvement in the organization. Barrios attempts to discredit the testimony with respect to the written record but the jury was free to credit Rivas's testimony as further evidence of Barrios's participation in the conspiracy. Based upon all of the evidence, the jury could reasonably determine that Barrios was an active member of the conspiracy.

D.

Nieto was convicted of two counts of aiding and abetting the possession of cocaine with intent to distribute in connection with the Sarita and Almeda-Genoa seizures. Nieto's main contention is that he had neither actual nor constructive possession of the cocaine in the case. Possession, however, is not a requirement of an aiding and abetting conviction. Salazar, 958 F.2d at 1292.

Nevertheless, Zuno's and Rivas's testimony linked him to the transportation of contraband that surrounded the two seizures in question.

In addition, testimony indicated that Nieto played a prominent role in the organization. Cocaine regularly passed through his warehouse and machine shop en route to distribution points in Houston. Nieto also was present with Capistran and Zuno when cocaine was transferred in Clute. The organization's activities surrounding the two seizures at issue here were certainly foreseeable by Nieto as normal activities of the conspiracy. Pinkerton, 328 U.S. at 647-48. Plainly, accomplice testimony and corroborating evidence sufficiently support the jury's verdict that Nieto aided and abetted the criminal activity with which he was charged.

E.

Garcia was convicted of the conspiracy count and one count of aiding and abetting in connection with the Sarita seizure. Garcia does not raise this argument explicitly in his brief to this court. Garcia does purport to adopt issues raised by his codefendants in accordance with FED. R. APP. P. 28(i). We, however, will not address a sufficiency of the evidence challenge on behalf of Garcia, as we have previously held that a sufficiency of the evidence contention is fact-specific to each individual defendant's conviction and, therefore, a co-appellant may not adopt that challenge. United States v. Harris, 932 F.2d 1529, 1533 (5th Cir. 1993).

IV.

In connection with the November 6, 1989, seizure of contraband at the Almeda-Genoa warehouse, a white Mercury Cougar that Jose Nieto had purchased in his father's name also was seized. The car was parked outside a house that was near the warehouse; Nieto had loaned it to Capistran, who consented to a search of the car. When confronted by the police, Capistran said that the car belonged to a friend but refused to disclose Nieto's name. Capistran gave police officers permission to search the car on two separate occasions. Nieto was not present at the Almeda-Genoa location when the police searched the area.

The district court denied Nieto's motion to suppress because he lacked standing to challenge the search and seizure of the automobile. On appeal, Nieto claims that car ownership evidence, derived from the search and seizure of the car, linked him to the seizure of the 600 kilograms of cocaine at the Almeda-Genoa warehouse. Nieto also challenges testimony referring to marihuana residue found in the car.

We need not reach the issue of standing; for the purposes of this appeal, we will assume arguendo that Nieto had standing. The main information from the car that Nieto claims prejudiced him was the link the government made between Nieto, the car, and the site of the seizure. While certain documents were taken from the car, government testimony plainly established that the license number from the car was also used to trace the registration to Nieto's father. The government then used testimony from a salesman to

establish Nieto's presence at the purchase. The license number of the car was plainly available to the police in the course of their search of the Almeda-Genoa property, the legality of which Nieto does not challenge. Therefore, Nieto was not prejudiced by the search with respect to the ownership information.

We find no prejudice to Nieto from the marihuana. Only traces of marihuana were found in the car. Given the evidence as a whole presented against Nieto at trial, some of which we have noted, we find it impossible to conclude that the marihuana traces had a substantial impact on the jury's verdict. See, e.g., United States v. Limones, 8 F.3d 1004, 1008 (5th Cir. 1993), cert. denied, 114 S. Ct. 1543, and cert. denied, 114 S. Ct. 1562 (1994).

V.

Nieto argues that his prosecution on the aiding and abetting count connected with the November 6 seizure of cocaine should have been collaterally estopped and barred by the Double Jeopardy Clause of the Fifth Amendment. On August 6, 1991, Nieto pled guilty, in McAllen, to a single count of conspiracy to possess with intent to distribute cocaine. This conspiracy was alleged to have occurred between November 6 and December 20, 1989. The conspiracy in the present case was alleged to have extended from January 1988 to May 1992. The government eventually dropped the conspiracy charge against Nieto in the present case. Nieto now, however, argues that the substantive count is barred as well, claiming that the guilty plea on the prior conspiracy charge encompasses the overt act for

which he is charged in the present case.

It is well-established that a person may be convicted of both a conspiracy to commit certain offenses and the substantive offenses that were the objects of the conspiracy. United States v. Felix, 112 S. Ct. 1377, 1384 (1992) (noting that "a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes"); United States v. Kalish, 734 F.2d 194, 198 (5th Cir. 1984), cert. denied, 469 U.S. 1207 (1985). Nieto attempts to avoid this line by couching his argument in terms of "collateral estoppel."

The collateral estoppel component of the Double Jeopardy Clause protects a criminal defendant from the relitigation of ultimate facts at subsequent prosecutions. Ashe v. Swenson, 397 U.S. 436 (1970). The Ashe Court noted that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. Moreover, "the collateral estoppel effect attributed to 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." United States v. Dixon, 113 S. Ct. 2849, 2860 (1993).

Recently in Wright v. Whitley, 11 F.3d 542, 546 (5th Cir.), cert. denied, 114 S. Ct. 2168 (1994), this court held that collateral estoppel bars "relitigation of a previously rejected factual allegation where that fact is an ultimate issue in the

subsequent case." Quite simply, Nieto has failed to indicate which ultimate issue pertaining to his conviction on the November 6, 1989, aiding and abetting count was previously rejected when he pleaded guilty to the earlier conspiracy charge. Accordingly, we reject his collateral estoppel claim.

VI.

Fuentes, along with Garcia and Barrios by adoption, argues that the district court improperly denied a defense request to strike a potential juror for cause. The decision whether to strike a juror for cause is committed to the sound discretion of the district court. United States v. Mendoza-Burciaga, 981 F.2d 192, 197-98 (5th Cir. 1992), cert. denied, 114 S. Ct. 356 (1993).

In this case, during voir dire, the judge screened the juror himself.[1] After determining that the venireman had been confused

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[1] The incident in question proceeded as follows:

> Mr. Vaclavik (venireman no. 15): ". . . You said that just because those people are sitting over there in that corner, that that probably does not mean that they're guilty. Then I ask you a question, was there not probable cause for them to be here in the first place, and is it not for the jury to decide whether they're guilty or innocent, if I'm selected as a juror."
>
> Mr. Bires (defense counsel): "Well, let me ask you . . . "
>
> Mr. Vaclavik: "I mean, that blew my mind, because I'm sitting here saying, you know, why are we here . . . I mean, I'm standing here saying that I assume in my mind that they're here because they probably are guilty, but I don't know the evidence; but until I find the evidence, if I'm chosen as a juror, until I find that evidence, I'm going to assume that something went wrong here."

The judge then instructed the jury that "these men are here because a grand jury decided that there was enough evidence to bring them to trial. That does not change the fact that they are not guilty."

The judge then asked Mr. Vaclavik:

> Court: "Do you have a problem with the fact that they're innocent and they must remain innocent unless the government can prove that

(continued...)

by "some lawyer talk," the judge refused to grant the challenge for cause. Here, where the judge took pains to screen the juror, we find no abuse. Id. at 198.

Moreover, the defendants failed to prove prejudice from the failure to excuse the juror for cause. The juror did not serve, because he was peremptorily struck. Thus, defendants have not established any prejudice that amounts to reversible error. At most, defendants lost a peremptory strike, which itself is not ground for reversal. Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

VII.

Nieto and Garcia challenge the admissibility at trial of extraneous criminal offenses. Nieto challenges the admissibility of evidence that showed that he had offered to supply cocaine to an undercover DEA agent for transport to New York, California, or Florida. This evidence formed the backbone of the government's earlier conspiracy case against Nieto. Garcia challenges the admissibility of evidence that he was arrested on September 10, 1992, at the Amtrak station in Houston with twenty-five pounds of marihuana.

Defendants argue that the evidence was unduly prejudicial and

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(...continued)

they're guilty beyond a reasonable doubt?"

Mr. Vaclavik: "Your Honor, I have no problems with that, but the way he made the statement threw me off."

Court: "I understand."

Mr. Vaclavik: "And I apologize."

should have been excluded from trial. In both instances, the government counters that the evidence was relevant to the issue of intent.

We articulated a two-step analysis for determining the admissibility of extrinsic offense evidence under FED. R. EVID. 404(b) in United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979).

> First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403.

The district court's ruling under rules 403 and 404(b) is reviewed for abuse of discretion. United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993).

In United States v. Robinson, 700 F.2d 205, 213 (5th Cir. 1983), we held that district courts were required to make on-the-record findings on the probative value/prejudice issue if requested to do so by a party. If a court fails to make such findings, remand becomes necessary "unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." Id.

Garcia placed his intent into issue by entering a plea of not guilty. United States v. Prati, 861 F.2d 82, 86 (5th Cir. 1988). The Prati court specifically noted that "in a conspiracy case the mere entry of a not guilty plea raises the issue of intent sufficiently to justify the admissibility of extrinsic offense

evidence." Id. The trial court explicitly noted that the evidence in question was more probative than prejudicial on the issue of intent and knowledge. Consequently, we will defer in this instance and find no abuse of discretion.

Similarly, in Nieto's case, the court determined that the prejudice did not outweigh the probative value of the evidence. The evidence in this case was probative on the issue of knowledge and intent. Nieto was not charged with the conspiracy, but the government had to show his knowledge of the cocaine trafficking activity of the organization in order to link him to the seizures on March 14 and November 6. Again we find no abuse of discretion.

In the alternative, we note that any error here is harmless. "In a harmless error examination, '[w]e must view the error, not in isolation, but in relation to the entire proceeding.'" United States v. Williams, 957 F.2d 1238, 1244 (5th Cir. 1992) (quoting United States v. Brown, 692 F.2d 345, 350 (5th Cir. 1982)). We must decide whether the inadmissible evidence actually contributed to the jury's verdict. To constitute reversible error, the evidence must have had a "substantial impact" on the verdict. United States v. El-Zoubi, 993 F.2d 442, 446 (5th Cir. 1993).

We have already noted the substantial evidence to convict Nieto. Co-conspirator testimony established that he played a prominent role in the organization's transportation activities. The admission of his conversation with the DEA agent added, at most, marginally to the government's case.

With respect to Garcia, we rejected his sufficiency claim

because he is not allowed to raise it by adoption. We determine here, however, that not only did sufficient evidence exist against him, but a quantum of evidence that would render the admission of the extrinsic evidence harmless beyond a reasonable doubt. Jasso and Rivas testified at trial that Garcia was a member of the conspiracy. Garcia was one of the persons who drove trucks from cocaine stash locations in Brownsville to Houston. In fact, Garcia himself was arrested at the Sarita checkpoint seizure because he was a passenger in the rig. Testimony indicated that Garcia rode in the rig in an effort to capitalize on his association with government officials at the checkpoint. In light of the record as a whole, we conclude that the jury's verdict in this case was not substantially affected by the admission of the extrinsic evidence pertaining to Garcia or Nieto.

VIII.

Garcia argues that the credibility of prosecution witness Jasso was improperly bolstered at trial. The defense claimed that the fact that the district judge had accepted Jasso's plea agreement, when brought to the attention of the jury, conveyed a message to the jury that the judge thought that witness was credible.[2] The court denied the defense motion for a mistrial but

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[2] The defense made the following objection:

Mr. Bires: "Your Honor, that's the second time that the government has interjected in front of this jury that one of these cooperating defendants has pled guilty to you and been sentenced by you and has been sentenced by you under very favorable terms, and it has also been in place before this jury that one of the

(continued...)

provided a cautionary instruction to the jury.[3]

We believe that any potential prejudice in this case was cured by the cautionary instruction. See United States v. Willis, 6 F.3d 257, 263 (5th Cir. 1993); see also Zafiro v. United States,

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(...continued)

conditions of their plea and one of their conditions of receiving favorable treatment is that they testify truthfully in any proceedings in federal court.

It puts us in a really bad situation because the jury is placed on notice that this person has fulfilled his contract with the government and that this Court has given the imprimatur to it by fulfilling the bargain, by honoring the bargain with a reduced sentence . . . I think it just absolutely and fundamentally undermines my client's right to a fair trial in this courtroom because the jury))and I firmly believe that juries have a tremendous amount of respect for judges and think that they cannot do any wrong and look to you for guidance . . . ."

Court: "Your problem is not the plea agreement but that I'm the one that took the plea agreement?"

Bires: "Yes, sir."

Court: "Okay."

Bires: "In every case there is a plea agreement."

Court: "Never even thought of that."

Bires: "It's the fact that you are the one that honored the bargain the government had with these particular defendants by sentencing them in a way that complies with their agreement. In other words, you bought his story and their story that they're telling the truth and it conveys a message to the jury."

[3] The court instructed the jury as follows:

Ladies and gentlemen, one of the most important jobs a jury performs is to decide whether to believe witnesses when they talk to you from the witness stand, obviously. Don't let the fact that these people have pleaded guilty before me enter into that decision whether you believe them or not. I may have to decide whether I believe them in connection with sentencing, but don't let it affect how you believe.

You consider whether you believe a witness, whether it's this young man or anybody else that testifies, based upon the factors that are common sense. How do they tell their stories? Have they been contradicted by somebody else? Do they have a motive to lie? Do they seem to be honest? You know how to tell when people are telling the truth.

So just don't pay any attention to the fact that they may have pleaded guilty before me and promised to testify. Would you do that?

113 S. Ct. 933, 939 (1993) (noting that "juries are presumed to follow their instructions"). As a result, we find that the jury's verdict was not substantially affected by this information. Therefore, there was no reversible error.[4]

IX.

Capistran claims that he has a history of mental illness upon which his counsel failed to act. He argues that his attorney's performance was ineffective under the standards of the Sixth Amendment. An ineffective assistance claim will not be reviewed on direct appeal if it was not raised below unless it is one of those "rare instances where an adequate record exists to evaluate such a claim on direct appeal." United States v. Pierce, 959 F.2d 1297, 1301 (5th Cir.), cert. denied, 113 S. Ct. 621 (1992). This case is not one of those rare instances.

X.

Capistran claims error because he was denied a hearing to determine whether he was competent to stand trial. According to 18 U.S.C. § 4241(a):

> The court shall grant the [defense or prosecution motion for a competency hearing], or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against

[4] Defendants Fuentes and Barrios purport to adopt this issue under rule 28(i). Because this issue is a fact-specific inquiry, however, it cannot be raised by adoption. Harris, 932 F.2d at 1533.

him or to assist properly in his defense.

Before or during trial, the district court did not have reasonable cause to believe that Capistran was suffering from a mental defect. Before sentencing, however, the court was informed of Capistran's mental history. The pre-sentence investigation report ("PSR") noted that Capistran had reported hearing voices and had been hospitalized in November 1988 for mental health problems. Capistran also reported that he was taking Haldol for his allegedly schizophrenic condition.

An addendum to the PSR indicated that Capistran's mental history had been verified by medical records obtained from several doctors who had treated him. The PSR also indicated that the medical records were available for the district court to review.

Courts violate a defendant's due process by failing to provide competency hearings where evidence raises "bona fide doubt" about competency. McInerney v. Puckett, 919 F.2d 350, 351 (5th Cir. 1990). When a district court has held a competency hearing, we review the competency determination under a clearly erroneous standard. United States v. Dockins, 968 F.2d 888, 890 (5th Cir. 1993). The district court did not hold a hearing in this case, however. Strong evidence indicated doubt as to Capistran's competency, so the district court erred in failing sua sponte to order a competency hearing. Such an error does not warrant automatic reversal, United States v. Hutson, 821 F.2d 1015, 1018 (5th Cir. 1987), as Capistran's substantive rights were affected only if he was actually incompetent at the time of trial.

This circuit has ruled that a defendant's procedural rights may be vindicated by a meaningful retrospective competency hearing. Id. Thus, we remand to the district court to determine whether a meaningful retrospective competency hearing can be held. See Bruce v. Estelle, 536 F.2d 1051, 1056-57 (5th Cir. 1976), cert. denied, 429 U.S. 1053 (1977). If a meaningful hearing can be held, the district court should proceed to determine whether Capistran was competent to stand trial. Hutson, 821 F.2d at 1018. If a meaningful hearing can be held, and Capistran is held to have been competent at the time of the trial, his convictions will be affirmed in accordance with this opinion. If Capistran is found to have been incompetent or a meaningful hearing cannot be held, Capistran can be retried only after he is found to be competent. Id. at 1021.

XI.

A.

Garcia, Barrios, and Nieto challenge the district court's calculation of the base amount of drugs involved in each of their cases for sentencing purposes. In each instance, the court determined that a base level of 42 applied because over 1,500 kilograms of cocaine was involved.

The district court's calculation with respect to the amount of drugs involved is a factual finding that we review for clear error. United States v. Rogers, 1 F.3d 341, 342 (5th Cir. 1993). The district court may rely upon information contained in the PSR as

long as the information has some minimum indicia of reliability. United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454, and cert. denied, 113 S. Ct. 2983 (1993).

This court has held that defendants who take part in "jointly undertaken criminal activity" may be held accountable, in the determination of their base offense level, for their own conduct as well as "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." United States v. Smith, 13 F.3d 860, 864 (5th Cir.), cert. denied, 114 S. Ct. 2151 (1994). In a drug conspiracy, the district court can consider drugs that were part of "the same scheme, course of conduct, or plan." Rogers, 1 F.3d at 345.

Garcia was sentenced on the basis of three cocaine trafficking trips that the PSR noted that he made, involving between 800 and 1,200 kilograms of cocaine. The court sentenced him on the basis of 2,400 kilograms of cocaine. Garcia challenges the district court's determination that Garcia was involved in three separate drug trafficking trips.

Garcia was a driver for the organization. Co-conspirator testimony and hotel receipts indicate that he was involved in trips in January and February 1989. In addition, he was arrested at the Sarita checkpoint seizure in March 1989. Fully 825 kilograms were seized at the Sarita checkpoint seizure, and similar amounts were involved in the January and February trips. The finding that Garcia trafficked in 2,400 kilograms of cocaine is not clearly erroneous.

Like Garcia, Barrios was a driver for the organization. The PSR indicated that Barrios made five trafficking trips between August 1988 and January 1989. The PSR also determined that between 800 and 1,200 kilograms were involved in each trip. The court sentenced based upon a total of 4,000 kilograms of cocaine. Again, co-conspirator testimony, including that of Rivas, Zuno, and Jasso, and hotel records support the PSR's conclusions and the court's findings. We do not find clear error here.

Nieto's base level was calculated using an amount of over 24,000 kilograms of cocaine. This number included 7,664 kilograms found at the Bass Boulevard ranch in October 1989 as well as 17,240 kilograms shipped to Munguia during the course of jointly undertaken criminal activity.

Nieto claims that he is, in effect, being punished twice for the same conduct because of his earlier sentence on conspiracy charges pending from actions taken in November and December 1989. We reject Nieto's argument.

The PSR from Nieto's earlier conviction indicates that he was being held accountable for only three kilograms of cocaine in connection with his attempt to traffic cocaine through undercover DEA agents. The district court in this case held Nieto accountable for drugs foreseeable while he was aiding and abetting separate activities. There is no indication that Nieto previously has been held accountable for the drugs that were funneled through the ranch, his machine shop, or the Brownsville warehouse. Moreover, it is well established that conduct previously considered as

relevant conduct in one case can be used to calculate the base offense level in a subsequent prosecution. United States v. Cruce, 21 F.3d 70, petition for cert. filed (U.S. June 24, 1994) (No. 93-9711).

The district court did not err by adopting the PSR's findings that held Nieto accountable for the cocaine seized at the Bass Boulevard ranch in October 1989 and for 17,240 kilograms of cocaine shipped to Munguia over the course of time.[5] These amounts certainly involved conduct that was reasonably foreseeable to Nieto, especially in light of his role as a transportation organizer within the organization. Nieto easily reached and surpassed the 1,500-kilogram threshold to warrant a base offense level of 42.

B.

Both Fuentes and Nieto received four-level upward adjustments for sentencing purposes under U.S.S.G. § 3B1.1. This section provides for an increase if the defendant is found to be an "organizer or leader of criminal activity involving five or more participants or was otherwise extensive." The guidelines do not say that a defendant has to have personally supervised five or more persons. Again we review the district court's findings regarding a defendant's conduct for clear error. United States v. Pofahl, 990 F.2d 1456, 1480 (5th Cir.), cert. denied, 114 S. Ct. 266, and

[5] According to the PSR, Munguia admitted to distributing over 20 tons of cocaine but was held accountable for only 17,240 kilograms, which was the amount supported by seizures and debriefings.

cert. denied, 114 S. Ct. 560 (1993).

Evidence obviously supported a finding that the Juan Garcia Abrego group involved well over five participants. The PSR's finding that Nieto served as a leader was supported by testimony indicating that Nieto led a transportation arm of the Abrego organization. The district court did look beyond the two substantive offenses for which Nieto was convicted to determine that he was a leader. This is allowed under the law of the circuit. United States v. Vaquero, 997 F.2d 78, 84 (5th Cir.), cert. denied, 114 S. Ct. 614 (1993).

Nevertheless, Nieto argues that this constituted double punishment, given his earlier conviction for trafficking activity. We reject this argument again, as there is no indication that the current sentence is consideration of conduct for which he has been punished. In any event, conduct that enhances a base offense level may be the subject of a separate prosecution without implicating double jeopardy. United States v. Ainsworth, 932 F.2d 358, 363 (5th Cir.), cert. denied, 112 S. Ct. 327, and cert. denied, 112 S. Ct. 346 (1991).

Fuentes claims that he did not supervise more than one person. Evidence indicated that Fuentes's activities involved at least five participants. While Fuentes may not have directly controlled five participants, the guidelines do not have such a requirement. The district court adopted the findings of the PSR, which noted that Fuentes played a significant role in transporting the cocaine that went through the Bass Boulevard location. Fuentes was in direct

contact with Matamoros and would take charge of the cocaine when it arrived from Mexico. We find no error in the district court's assessment of Fuentes's role.

C.

All five defendants received two-level enhancements under U.S.S.G. § 2D1.1(b)(1) for firearms related to a drug offense. We review for clear error. Vaquero, 997 F.2d at 84. This circuit has held that defendants may be charged because of a co-defendant's reasonably foreseeable possession of a firearm during the commission of an offense. United States v. Aguilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990). In drug trafficking cases, firearms are ordinarily regarded as "tools of the trade." United States v. Mergerson, 4 F.3d 337, 350 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994).

Fuentes, Capistran, Garcia, and Barrios, who were all convicted on the conspiracy count, claim that they were never personally in possession of firearms and that the record fails to indicate that it was common knowledge in the organization that co-conspirators carried guns. The PSR's indicated that numerous firearms were seized in conjunction with the drugs seized at many sites during the investigation of this conspiracy. In addition, the PSR's said that it was common knowledge that many members of the organization carried firearms.

Nieto claims that the court is limited to examining evidence surrounding the two substantive counts for which he was convicted.

We again reject this argument. Offense level adjustments are to be determined using all conduct within the scope of § 1B1.3. Vaquero, 997 F.2d at 84.

With respect to all defendants, the district court found that it was reasonably foreseeable that weapons would be involved in the criminal activity of the organization, given its size, the amount of drugs involved, and the number of guns confiscated. Moreover, the PSR indicated that Munguia, Banda, and others carried guns. Testimony also indicated that Banda and Zuno regularly carried guns. We find no clear error here.

Fuentes (along with Garcia and Barrios by adoption) also argue that the district court violated the Ex Post Facto Clause of the Constitution by applying a guideline version that replaced a previous scienter requirement for § 2D1.1(b) with the lesser "reasonable foreseeability" standard. Defendants claim that the pre-November 1, 1989, guidelines should have been applied and that the two-level enhancement would not have occurred.

The Ex Post Facto Clause, Article 1, § 9, cl. 3 of the Constitution, prohibits the retroactive application of a penal law only if it causes a disadvantage to the defendant. United States v. Suarez, 911 F.2d 1016 (5th Cir. 1990). In this case, under Aguilera-Zapata, defendants would have received the enhancement under the earlier version of the guidelines.

We acknowledge that under Suarez, a defendant had to possess a firearm intentionally in order to have a sentence enhanced. This scienter requirement, however, applied only to personal possession

cases. Aguilera-Zapata expressly approved an inference that a "defendant should have foreseen a co-defendant's possession of a dangerous weapon, such as a firearm, if the government demonstrates that another participant knowingly possessed the weapon." 901 F.2d at 1215. See also Suarez, 911 F.2d at 1019, n.1 (distinguishing Aguilera-Zapata). Because testimony in this case established that members of the organization knowingly carried guns, the enhancement was warranted under the pre-November 1, 1989, guidelines as well as the post-November 1, 1989, guidelines.

D.

Barrios and Fuentes (with Garcia by rule 28(i) adoption) argue that the district court erred in applying the 1992 version of the guidelines to their conspiracy convictions.[6] Garcia and Barrios claim that their involvement in the conspiracy ended sometime in 1989. Under the 1988 version of the guidelines, defendants' base offense level would have been 36 instead of 42. Each defendant claims that he was faced with an increased penalty because of the application of the 1992 guidelines.

Defendants argue that their involvement in the conspiracy ended in 1989; defendants do not contend, however, that they withdrew from the conspiracy by taking "affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach other conspirators." United States

[6] Fuentes does not raise an ex post facto argument with respect to his substantive counts and, consequently, neither does Garcia. Barrios was convicted only on the conspiracy count.

v. U.S. Gypsum Co., 438 U.S. 422 (1978); United States v. Thomas, 12 F.3d 1350, 1371 (5th Cir.), cert. denied, 114 S. Ct. 1861, and cert. denied, 114 S. Ct. 2119 (1994). A conspirator who fails effectively to withdraw from a conspiracy

> will be sentenced under the [amendments to the] guidelines even if he himself did not commit an act in furtherance of the conspiracy after [the effective date of the amendments], or did not personally know of acts committed by other conspirators after [the effective date of the amendments], if it was foreseeable that the conspiracy would continue past the effective date of the [amendments].

United States v. Devine, 934 F.2d 1325, 1332 (5th Cir.), cert. denied, 112 S. Ct. 349, and cert. denied, 112 S. Ct. 911, and cert. denied, 112 S. Ct. 952, and cert. denied, 112 S. Ct. 954, and cert. denied, 112 S. Ct. 1164, and cert. denied, 112 S. Ct. 1709 (1991).

A district court's finding that a conspiracy did not cease for guidelines purposes is a factual finding reviewed for clear error. Thomas, 12 F.3d at 1371. In this case, there is no finding on the record with respect to Barrios and Garcia, because there is no indication that Barrios or Garcia raised this objection below. Consequently, we review for plain error. Pofahl, 990 F.2d at 1479.

Neither Barrios nor Garcia has established any affirmative act of withdrawal from the conspiracy. A government seizure of money occurred in April 1990, indicating that the conspiracy continued past 1989. The indictment further alleged that the conspiracy continued through 1992. The guideline amendments that went into effect on November 1, 1989, provide for a base offense level of 42 for the amount of drugs for which the defendants were found to be responsible. There is no plain error with respect to Barrios and

Garcia.

Fuentes first raised this argument at his sentencing hearing. He did not request a ruling on when the conspiracy ended. On appeal, Fuentes claims that his involvement terminated at the time of the Bass Boulevard seizure. He has not, however, established an affirmative act of withdrawal. Moreover, when the issue was raised at sentencing, he conceded that the conspiracy extended beyond November 1989. Because Fuentes has not questioned that the conspiracy continued beyond November 1, 1989, we find no clear error in the determination that the conspiracy continued beyond that date.

E.

Nieto challenges the court's rejection of his acceptance of responsibility for the offense. Under U.S.S.G. § 3E1.1(a), a defendant is entitled to a two-level reduction in his offense level if he "clearly demonstrates acceptance of responsibility for his offense." This is a determination of fact that we review under an even more deferential standard than clearly erroneous. United States v. Perez, 915 F.2d 947, 950 (5th Cir. 1990). The district court rejected Nieto's request, because a PSR addendum indicated that he had tried to escape from jail in March 1993 while incarcerated for the previous conspiracy conviction. This type of action is plainly inconsistent with a claim of acceptance of responsibility. We find no error.

XII.

For the foregoing reasons, we AFFIRM the convictions and sentences of all defendants except that we REMAND for a determination of whether a meaningful retrospective competency hearing for defendant Capistran can be held and for further proceedings consistent with this opinion.