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28 Appeals from the United States District Court  
29 for the Western District of Louisiana  
30 (91-CR-20055(1), 91-CR-20055(2), 91-CR-20055(10))  
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(January 10, 1994)

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Before HENDERSON\*, SMITH, and EMILIO M. GARZA, Circuit Judges.

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JERRY E. SMITH, Circuit Judge:\*\*

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Craig Washington, David Miserendino, and Robert Cantwell,

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three drug dealers engaged in a loose-knit conspiracy to import

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marihuana from Texas to Florida, appeal various applications of

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the Sentencing Guidelines (the "Guidelines"). Finding no error,

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we affirm.

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I.

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A deputy sheriff stopped a Ford pickup truck, and a search of

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the vehicle revealed 116 kilograms of marihuana. The police

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agreed to make a controlled delivery to the owner of the mari-

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huana, Miserendino. Subsequent investigation revealed the exis-

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tence of a loose-knit conspiracy of drug dealers in Florida who

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were obtaining drugs from Texas.

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Washington and Miserendino were involved in financing the

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travel of various couriers. Washington received a commission on

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\* Circuit Judge of the Eleventh Circuit, 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 Pursuant to that rule, the court has determined that this opinion should not be published.

49 loads that Miserendino brought back. The marihuana was distrib-  
50 uted through various networks in Florida composed of Cantwell and  
51 others.

52 All three defendants were charged in a four-count information  
53 and pled guilty to possession with intent to distribute marihuana.  
54 Presentence investigation reports ("PSR's") were prepared to which  
55 the defendants filed objections. As information was gathered  
56 through the cooperation of the defendants, the PSR's were amended  
57 to reflect the level of cooperation.

58 The district court filed a memorandum addressing the objec-  
59 tions raised by the defendants to their PSR's. The court adopted  
60 the factual findings in the PSR's, except as noted in the memoran-  
61 dum. Washington's offense level was 33 with a criminal history  
62 category of VI,<sup>1</sup> yielding a Guidelines range of 235 to 293 months'  
63 imprisonment. On a motion by the government, the court departed  
64 downward to 199 months' imprisonment, to be followed by five  
65 years' supervised release.

66 Miserendino was found to be a leader of the conspiracy, and  
67 the court enhanced his offense level by four points pursuant to  
68 U.S.S.G. § 3B1.1(a). His total offense level was 31 with a crimi-  
69 nal history category of II, yielding a Guidelines range of 121 to  
70 151 months' imprisonment. On a motion by the government, the  
71 court departed downward to 120 months' imprisonment, to be fol-  
72 lowed by four years' supervised release.

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<sup>1</sup> Washington's criminal history category was increased from IV to VI because of the career offender enhancement.

73 Cantwell's offense level was 19 with a criminal history cate-  
74 gory of II, yielding a Guidelines range of 33 to 41 months' im-  
75 prisonment. The court sentenced him to 41 months' imprisonment,  
76 to be followed by five years' supervised release.

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## II.

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Washington raises five issues on appeal. He claims that (1) the district court improperly restricted his right to comment on the PSR at sentencing; (2) he was denied his right to challenge the constitutionality of his prior convictions that rendered him a "career offender"; (3) the district court misapplied the career offender section of the Guidelines; (4) the district court improperly relied upon immunized statements in sentencing; and (5) the government breached the plea agreement with respect to relevant conduct. We review findings of fact under the "clearly erroneous" standard and legal application of the Guidelines de novo. United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990).

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### A.

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Washington claims that the judge refused to let him comment on the PSR at sentencing, in violation of his Fifth Amendment right to allocution. He cites the district court's statement that a memorandum ruling had been issued regarding the objections to the PSR and that it would not permit the defendant to present further objections at sentencing.

97 A defendant has a Fifth Amendment right to allocution at  
98 sentencing. United States v. Posner, 868 F.2d 720 (5th Cir.  
99 1989). Nevertheless, it is apparent that the district court did  
100 not restrict the defendant's right to object and comment at sen-  
101 tencing. In fact, the record reveals that Washington's counsel  
102 made lengthy comments at sentencing, addressing the defendant's  
103 career offender enhancement, his cooperation, his prior offenses,  
104 and the extent of his downward departure. The court permitted  
105 Washington to allocute, then asked whether he had anything further  
106 to present. We therefore conclude that the court did give Wash-  
107 ington the opportunity to comment and object, and given the ample  
108 opportunity he had to file written objections to the PSR, we must  
109 reject this first claim.

110 B.

111 Washington next claims that he was not given an opportunity  
112 to challenge the constitutionality of the prior conviction used  
113 against him for the career offender enhancement. But he made no  
114 mention of this argument in his written objections to the PSR  
115 (which he had eight months to complete), and he did not raise the  
116 issue during sentencing. We do not entertain arguments made for  
117 the first time on appeal. United States v. Mourning, 914 F.2d  
118 699, 704 (5th Cir. 1990).



120 Washington claims that the district court misapplied the  
121 career offender section of U.S.S.G. § 4B1.1. Nevertheless, Wash-  
122 ington's brief makes no specific mention of what errors were made  
123 in calculating the enhancement.

124 The district court adopted the recommendation of the PSR.  
125 Under § 4B1.1, a career offender is a defendant over the age of  
126 eighteen who commits an offense involving controlled substances  
127 and who has at least two prior felony convictions for crimes of  
128 violence or controlled substance offenses. Career offenders are  
129 automatically given a criminal history category of VI and a mini-  
130 mum base offense level. The PSR calculated his sentence correctly  
131 based upon a criminal history category of VI and a total offense  
132 level of 33.

133 Washington fails to specify how the calculations were wrong.  
134 But objections to the PSR must be specific to enable the court to  
135 correct inaccuracies. United States v. Ponce, 917 F.2d 846 (5th  
136 Cir.), cert. denied, 111 S. Ct. 1398 (1991). Washington's choice  
137 of offense level was not supported by the record, and his coopera-  
138 tion affects the level of departure, not the setting of the of-  
139 fense level.

140 D.

141 Washington further claims that the district court improperly  
142 relied upon immunized statements. The court considered, as rele-  
143 vant conduct, quantities of marihuana about which Washington pro-

144 vided information to the government. He claims that such quanti-  
145 ties should not have been used against him at sentencing.

146 The plea agreement provides, in part,

147 [A]ny statements made by the defendant during the coop-  
148 eration phase of this agreement shall not be used  
149 against the defendant in any subsequent prosecution un-  
150 less and until there is a determination by the court  
151 that the defendant has breached this agreement. How-  
152 ever, the United States government will be free to use  
153 at sentencing in this case any of the statements and  
154 evidence provided by the defendant . . . .

155 Washington claims that the plea agreement is "internally contra-  
156 dictory" and must "give way" to the more settled treatment of such  
157 statements and evidence as immunized. But § 1B1.8(a) provides  
158 that such statements and evidence are not to be used against the  
159 defendant, "except to the extent provided in the agreement."

160 The plea agreement unambiguously allows the use of informa-  
161 tion provided by the defendant at sentencing. It restricts the  
162 government's use of such information in the prosecution of the  
163 defendant, but the relevant conduct provision of the Guidelines,  
164 § 1B1.3, allows the court to consider the total quantity of drugs  
165 involved in the criminal conduct, including amounts not charged in  
166 the indictment. United States v. Mendoza-Burciaga, 981 F.2d 192  
167 (5th Cir. 1992). Section 1B1.8(a) does not restrict the  
168 government's right to use the information provided by Washington,  
169 as the plea agreement expressly permitted it.

170 E.

171 Lastly, Washington argues that the government breached the  
172 plea agreement by including greater quantities of marihuana in



173 Washington's relevant conduct than Washington expected. By sign-  
174 ing the plea agreement, Washington reasonably believed that he  
175 would be held accountable only for the 116 kilograms of marihuana.  
176 The court's consideration of other amounts of drugs as relevant  
177 conduct represents a breach of the plea agreement by the govern-  
178 ment.

179 This argument is without merit. The Guidelines allow all  
180 relevant conduct to be considered at sentencing, not just those  
181 acts charged in the indictment or conviction. Washington's belief  
182 that he was not responsible for the other drugs does not change  
183 the plain meaning of the plea agreement. Moreover, it is ques-  
184 tionable whether Washington really believed that only the  
185 116 kilograms of marihuana would be used against him. He signed  
186 an "Affidavit of Understanding of Maximum Penalty and Constitu-  
187 tional Rights" that indicated that his sentence could range from  
188 five to forty years. And he stated to the court, when he entered  
189 his plea, that he understood that the Guidelines would apply to  
190 his case and that he would be bound by his plea even if his sen-  
191 tence were more severe than expected. He confirmed that the rele-  
192 vant conduct was accurate and that no undisclosed promises were  
193 made to him. Thus, he has no recourse now.

194 III.

195 Miserendino raises one issue on appeal, contending that there  
196 was insufficient evidence to support the district court's finding  
197 that he was a leader and organizer of the conspiracy (which re-

198 sulted in a four-level enhancement). Miserendino argues that the  
199 court relied upon the PSR's findings of fact, which were supported  
200 by "unsworn assertions." He claims that there should have been a  
201 hearing pursuant to § 6A1.3(b) to determine whether he was a  
202 leader.

203 Section 6A1.3(a) requires that the court resolve any disputed  
204 factors for sentencing and ensures that the parties have an  
205 adequate opportunity to present information. It is within the  
206 judge's sound discretion to determine procedures to resolve such  
207 disputes. United States v. Pologruto, 914 F.2d 67 (5th Cir.  
208 1990). Section 6A1.3(b) requires the court to resolve disputed  
209 sentencing factors in accordance with FED. R. CRIM. P. 32. There is  
210 no requirement that the district court conduct an evidentiary  
211 hearing.

212 The district court notified Miserendino of its tentative  
213 findings and gave him an opportunity to object. The court  
214 overruled his objections, giving specific reasons for its finding  
215 of fact: Miserendino was the owner of the marihuana, at least  
216 five individuals were involved in the transportation, and he  
217 actively financed the travel. The court found that these factors  
218 outweighed his assertion that he was only one link in the chain,  
219 that he did not recruit accomplices, that he did not claim a  
220 larger share of the profits, and that he did not exercise control  
221 over anyone (except two of the couriers). While "unsworn  
222 assertions . . . do not provide, by themselves, a sufficiently  
223 reliable basis on which to sentence [a] defendant," United States

224 v. Patterson, 962 F.2d 409, 415 (5th Cir. 1992), the PSR stated  
225 that the facts were corroborated by telephone records, rental car  
226 receipts, hotel records, and cellular phone records. Therefore,  
227 the district court was justified in relying upon them.

228 When a fact contained in the PSR is disputed and the  
229 defendant objects to the court's specific finding, the defendant  
230 has the burden of showing that the fact is materially untrue,  
231 inaccurate, or unreliable. United States v. Young, 981 F.2d 180  
232 (5th Cir. 1992), cert. denied, 61 U.S.L.W. 3804 (U.S. 1993). The  
233 defendant failed to offer rebuttal evidence; the court therefore  
234 was free to adopt the PSR's facts without a more specific  
235 explanation. United States v. Rodriguez, 897 F.2d 1324, 1327 (5th  
236 Cir. 1990). Thus, the court was not clearly erroneous in its  
237 finding of a leadership role.

238 IV.

239 Cantwell raises one issue on appeal. He argues that the  
240 district court erred in failing to decrease his offense level by  
241 two points for his minor role pursuant to § 3B1.2(b). Cantwell  
242 states that he was never found to be in actual possession of the  
243 amount of marihuana to which he pled guilty, he never made trips  
244 to transport or pick up marihuana, and did not assist in the  
245 importation of the marihuana. Cantwell was, however, a frequent  
246 receiver of marihuana from the shipments into Florida. Under the  
247 comment to § 3B1.2, a defendant's participation is not minor

248 unless he is "substantially less culpable than the average participant."

249           It was Cantwell's burden to provide evidence of his minor  
250 role. Without any such showing, his consistent role as a  
251 distributor over a period of time precludes the finding that he  
252 was a minor participant. See, e.g., United States v. Thomas, 963  
253 F.2d 63, 65 (5th Cir. 1992); United States v. Geraldo-Lara, 919  
254 F.2d 19, 22 (5th Cir. 1990).

255           AFFIRMED.