**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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93-7764
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR IGLESIAS-MUNOZ,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Texas
(C-90-CR-236-3)

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(September 26, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Oscar Iglesias-Munoz, convicted following a plea of guilty pursuant to a plea agreement, appeals various aspects of his sentencing, to-wit: (1) The quantity of marijuana attributed to him under the provision for relevant conduct; (2) an increase in his base offense level for a leadership role; and (3)

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

an increase in offense level for obstruction of justice. Finding no reversible error in the sentencing court's determinations regarding these matters, we affirm.

## I

## FACTS AND PROCEEDINGS

A superseding indictment was filed on June 24, 1990, charging Iglesias-Munoz with several marijuana-trafficking crimes. Released on bond pending trial, Iglesias-Munoz failed to appear for the final pretrial conference on October 1, 1990, and was not apprehended until July 2, 1993.

Pursuant to a written plea agreement, Iglesias-Munoz pleaded guilty to count ten of the indictment, possession with intent to distribute approximately 80 kilograms of marijuana on or about March 2, 1990. In exchange for his plea, the government agreed to move to dismiss the remaining counts against him. The plea agreement provided that if the Probation Office determined in the PSR that the quantities of marijuana alleged in counts two, nine, and eleven should be considered as relevant conduct pursuant to § 1B1.3 of the United States Sentencing Guidelines (the guidelines), the government would be required to present evidence at the sentencing hearing with regard to the marijuana alleged in those counts.

The probation officer who prepared the PSR concluded that the quantity of marijuana reflected in counts nine through twelve should be considered relevant conduct. The PSR also contained a recommendation for a four-level increase pursuant to § 3B1.1(a) for

Iglesias-Munoz's role as a leader of a criminal activity that involved more than five participants, and a two-level increase for obstruction of justice pursuant to § 3C1.1(3)(e) for Iglesias-Munoz's failure to appear for his final pretrial conference. The PSR contained a determination that Iglesias-Munoz's total offense level was 35, yielding a sentencing range of 210 to 240 months.[1]

Iglesias-Munoz filed written objections to the PSR. At the conclusion of the sentencing hearing, the district court adopted the findings in the PSR and sentenced Iglesias-Munoz to imprisonment for 210 months, three years' supervised release, and a $50 special assessment. Iglesias-Munoz timely filed a notice of appeal.

## II.

## ANALYSIS

### A. Quantity of Marijuana

Iglesias-Munoz insists that the district court erred in attributing to him all of the marijuana in counts nine, eleven, and twelve of the indictment for sentencing purposes. He contends that the evidence presented at the sentencing hearing did not tie him to the February 26, 1990, (count 9), or March 6, 1990, (count 11), loads of marijuana.

Relevant conduct includes quantities of drugs not specified in

[1]The PSR used the 1992 edition of the Guidelines, even though the defendant was sentenced on November 29, 1993, after the effective date of the 1993 edition. The version of the Guidelines in effect on the date of sentencing is supposed to be used. 18 U.S.C. § 3553(a)(4); § 1B1.11(a), p.s. (Nov. 1993). There was no objection to the use of the 1992 edition, however, and no explanation was made.

the count of conviction if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. § 1B1.3(a)(2); § 2D1.1, comment. (n.12); U.S. v. Bryant, 991 F.2d 171, 177 (5th Cir. 1993). The amount of drugs for which an individual is to be held accountable at sentencing represents a factual finding and will be upheld unless clearly erroneous. U.S. v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993), cert. denied, 114 S. Ct. 1096 (1994). A factual finding is not clearly erroneous if it is plausible in light of the record as a whole. Id.

Mark Hanna, one of Iglesias-Munoz's co-conspirators, testified that he helped Iglesias-Munoz smuggle marijuana from Mexico into the United States approximately six times between November 1989 and March 1990. Hanna was told by Iglesias-Munoz that his brother, Miguel Iglesias, and Miguel's men, were responsible for getting the marijuana up to the river where Iglesias-Munoz and his men would pick it up.

In late February 1990, Iglesias-Munoz told Hanna that a load of approximately 3,200 pounds of marijuana was coming from Mexico in "two or three days." Shortly afterward, Iglesias-Munoz told Hanna about a smaller load of marijuana, approximately 80 kilos. Hanna was arrested while bringing this load through the Falfurrias checkpoint of March 2, 1990. He testified that this load was part of a larger load of marijuana also seized at the checkpoint.

Rogelio Escalona, another of Iglesias-Munoz's co-conspirators, testified that he helped Iglesias-Munoz transport marijuana on

March 2, 1990. Escalona was informed by Iglesias-Munoz that he was concerned about his merchandise and wanted to make sure that everything "went right" because he had previously "lost" marijuana at a checkpoint.

Fausto Gonzales-Cardenas, assistant commandant for the Federal Judicial Police in Mexico, testified that on March 6, 1990, two individuals informed police that they had been hired by Miguel Iglesias to help smuggle a ton and a half of marijuana across the Rio Grande. The officers subsequently discovered 1,554 kilos of marijuana and Miguel Iglesia's identification. During the course of his investigation Gonzales-Cardenas heard that Iglesias-Munoz would probably be receiving the marijuana.

The testimony presented at the sentencing hearing thus connected Iglesias-Munoz to the quantities of marijuana alleged in counts nine (1,474 kg) and eleven (1,363 kg) of the indictment. The district court's finding that 2,917 kilograms of marijuana were attributable to Iglesias-Munoz for sentencing purposes was not clearly erroneous.

B. Leadership Role

Iglesias-Munoz argues that the district court erred by assessing a four-level increase in his base offense level for his leadership role in the offense pursuant to § 3B1.1(a).

"If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the offense level is to be increased by four levels. § 3B1.1(a). To qualify for this upward adjustment, the defendant

must have been the organizer or leader of at least one of the other participants. Id., comment. (n.2).

Seven factors should be considered in making a leadership finding. They are "(1) the exercise of decision-making authority; (2) the nature of participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share of the fruits of the crime; (5) the degree of participation in planning or organizing the offense; (6) the nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others." U.S. v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989) (citing § 3B1.1, comment. (n.3)). The defendant's role in a criminal activity for the purposes of § 3B1.1 may be deduced inferentially from available facts. U.S. v. Manthei, 913 F.2d 1130, 1135 (5th Cir. 1990).

A reviewing court will not disturb a district court's factual findings regarding a defendant's role in a criminal activity unless those findings are clearly erroneous. Barreto, 871 F.2d at 512. A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole. U.S. v. Watson, 966 F.2d 161, 162 (5th Cir. 1992).

Mark Hanna testified at the sentencing hearing that he began working for Iglesias-Munoz in December 1987, smuggling marijuana from Mexico into the United States. For the initial load in December 1987, Iglesias-Munoz stood watch while seven or eight individuals loaded over 4,000 pounds of marijuana onto a life raft and brought it across the river. Hanna testified that Iglesias-

Munoz was responsible for paying all the people who helped smuggle the marijuana.

Hanna testified that after the December 1987 load, Iglesias-Munoz went into hiding. In November 1989, however, Hanna began working for Iglesias-Munoz again, smuggling marijuana. Hanna testified that, as he had done during the previous load, Iglesias-Munoz stood watch while seven or eight individuals brought the marijuana across the river. Iglesias-Munoz guided the men and told them what to do.

Between November 1989 and March 2, 1990, Hanna was involved in smuggling marijuana from Mexico into the United States approximately six times. Each time, Iglesias-Munoz watched, supervised, inspected the marijuana, and paid the individuals who helped. After the marijuana was brought into the United States, it was taken to a stash house. Iglesias-Munoz told Hanna that the marijuana was "being kept there and he would get paid a percentage."

Escalona testified that he helped Iglesias-Munoz smuggle marijuana on March 2, 1990. Iglesias-Munoz gave Escalona $5,000 to pay the individual who was going to transport the marijuana. Escalona was told by Iglesias-Munoz that he was concerned about his merchandise and wanted to make sure that everything "went right."

Testimony at the sentencing hearing thus established that Iglesias-Munoz recruited accomplices to help him smuggle marijuana, acted in a supervisory position over seven or eight individuals, instructed them as to what to do, paid them, inspected the

marijuana when it came across the river, and received a percentage of the profits. The district court did not clearly err in assessing Iglesias-Munoz a four-level increase for his role in the offense.

C. Obstruction of Justice

Iglesias-Munoz argues that the district court erred by increasing his offense level for obstruction of justice pursuant to § 3C1.1. He contends that he had no intent to obstruct justice, but that he stayed away from court because his wife was dying of cancer and he wanted to remain with her until she died.

A district court's determination that a defendant's offense level should be increased for obstruction of justice is reviewed for clear error. U.S. v. Laury, 985 F.2d 1293, 1308 (5th Cir. 1993). Section 3C1.1 provides for a two-level enhancement "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense . . . ." The guidelines explicitly list willfully failing to appear for a judicial proceeding as an example of conduct to which this enhancement applies. § 3C1.1, comment. (n.3).

Iglesias-Munoz testified at the sentencing hearing that he knew that he was supposed to appear in court in October 1990, but that he decided not to appear and went to Mexico instead because his wife had cancer. The probation officer testified that after Iglesias-Munoz failed to appear, he remained in Mexico for two years and did not return to the United States until 1992. The

district court's decision to assess a two-level increase for obstruction of justice was thus not clearly erroneous.

AFFIRMED.