

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8235  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO JAVIER CALDERON-URIAS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. MO-92-CR-87(01)  
- - - - -  
(October 29, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:\*

Francisco Javier Calderon-Urias (Calderon), a/k/a Juan Urias Garcia, appeals the district court's upward departure from the sentencing guidelines, asserting that the departure was based on unreliable information contained in the PSR.

The findings of fact made by the district court must be upheld by the reviewing court unless they are clearly erroneous. United States v. Gallegos, 868 F.2d 711, 713 (5th Cir. 1989). In making a sentencing determination, the district court may

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

consider any relevant evidence "without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." United States v. Alfaro, 919 F.2d 962, 964 (5th Cir. 1990). "A defendant who objects to the use of information [in a PSR] bears the burden of proving that it is `materially untrue, inaccurate or unreliable.'" United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, 112 S.Ct. 1677, 2290 (1992) (citation omitted). Calderon failed to do so. In his brief, Calderon cites Alfaro for the proposition that unsworn statements should not be considered reliable in the sentencing context. However, the very next paragraph in Alfaro states that "a presentence report generally bears sufficient indicia of reliability to be considered by the trial judge in making the factual determinations required by the sentencing guidelines." 919 F.2d at 966.

Calderon's participation in the heroin offense was an appropriate reason for upward departure, and the increase of 27 months above the guideline range of 27-33 months was not unreasonable. We have upheld a similar departure. United States v. Lambert, 984 F.2d 658, 664 (5th Cir. 1993) (en banc) (upward departure to a sentence of 36 months, twice the possible maximum guideline sentence).

The sentence is AFFIRMED.