

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8800

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE FREDDIE SALDIVAR,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Western District of Texas  
(SA-93-CR-24-1)

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(February 10, 1995)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:\*

Jose Freddie Saldivar appeals his conviction and sentence for conspiracy to manufacture methamphetamine and related offenses. Having considered the pertinent parts of the record and the briefs and oral arguments of counsel, we find no reversible error. Only one of the errors assigned requires explication -- the issue of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

multiple conspiracies as it relates to the conviction and sentence.

From late 1987 until April 1988 Saldivar manufactured methamphetamine with Michael Hoffman and Russell Knox at an isolated 1300-acre ranch in Mills County, Texas. Law enforcement agents raided the ranch but Saldivar resumed his illicit activities elsewhere, obtaining chemicals and methamphetamine oil from Donald Romano during 1989 and 1990 until Romano's arrest on a trip to Florida, on Saldivar's behalf, to obtain five kegs of phenylacetic acid. Continuing his operations, in 1991 Saldivar began supplying chemicals and equipment to Robert Vaughan and Paul Cooley, who conducted "cooks" from which Saldivar took two-thirds of the yield.

Saldivar was indicted for conspiracy to manufacture and distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846, conspiracy to launder the proceeds of his methamphetamine trade in violation of 18 U.S.C. §§ 371 and 1956(a)(1)(B)(i), and possession of a listed chemical with intent to manufacture a controlled substance in contravention of 21 U.S.C. § 841(d)(1). He was convicted by a jury and sentenced to 360 months imprisonment.

Saldivar claims a variance between the indictment and proof. He contends that the government proved multiple conspiracies while the indictment charged but one. A variance between the indictment and proof is not fatal unless it prejudiced the defendant's substantial rights. Such prejudice usually takes the form of transference of guilt: the defendant is convicted of a conspiracy, in which he did not participate, because of his participation in an

uncharged conspiracy.<sup>1</sup> In the instant case, there is no such concern. Not only did the trial court give a jury instruction warning against the transfer of guilt but also the evidence amply demonstrated Saldivar's involvement in each of the supposedly separate conspiracies.<sup>2</sup>

Saldivar, however, contends that the variance prejudiced him at sentencing, where the single-conspiracy indictment allowed the trial court to aggregate the persons involved in all three conspiracies to find a five-person enterprise supporting an upward adjustment under the Sentencing Guidelines. U.S.S.G. § 3B1.1(a) permits a four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Assuming *arguendo* that the charged conduct constituted separate conspiracies, the prerequisites for a section 3B1.1(a) enhancement nevertheless were satisfied. Saldivar's arrangement with Romano constituted "a criminal activity involving five or more participants": Saldivar and his lieutenants -- James Michael Pruitt and John Yeater -- and Romano and his subordinates -- Arthur Eckert, Arthur Dee Hodge, Melvin Carter, Albert Wechsler, Sr., and Albert Wechsler, Jr.

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<sup>1</sup>**United States v. Puig-Infante**, 19 F.3d 929 (5th Cir.), cert. denied, 115 S.Ct. 180 (1994).

<sup>2</sup>See **Puig-Infante** (a multiple conspiracies instruction eliminates the concern about transference of guilt); **United States v. Jackson**, 978 F.2d 903 (5th Cir. 1992) (where the indictment charges one conspiracy and the government proves the defendant's involvement in at least one of multiple conspiracies, the variance between the indictment and the proof does not affect the defendant's substantial rights), cert. denied, 113 S.Ct. 2429 and 113 S.Ct. 3055 (1993).

Saldivar was an organizer or leader of the enterprise and personally supervised Pruitt, Yeater, and Romano.<sup>3</sup> That is sufficient to support a section 3B1.1(a) enhancement; Saldivar need not personally have supervised five participants.<sup>4</sup>

The convictions and sentences are AFFIRMED.

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<sup>3</sup>Saldivar denies that he supervised Romano. The evidence indicates that he did. Romano traveled to Florida to pick up the kegs of phenylacetic acid at Saldivar's behest.

<sup>4</sup>**United States v. Okoli**, 20 F.3d 615 (5th Cir. 1994).