UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40723

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTURO LOPEZ,
JOSE LUIS RODRIGUEZ,
FRANCISCO LOPEZ, and
PATRICIO HOMERO SAENZ, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Louisiana
(CR-93-20046)

November 21, 1995

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:[*]

This direct criminal appeal involves four appellants who were convicted of various drug offenses. Among a number of complaints the appellants raise on appeal are the specific claims that: (1)

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the evidence is insufficient to support the convictions for a continuing criminal enterprise; (2) based on the jury charge, which instructed the jury conjunctively regarding the two objects of the conspiracy, the evidence is insufficient to support the conviction for conspiracy to import and possess with intent to distribute cocaine and marijuana; (3) and the district court miscalculated Saenz' base offense level at sentencing. After carefully considering the record, briefs, and all argument of counsel, we find no error that would warrant the reversal of the convictions set out in the judgments of the district court. We do, however, vacate and remand the sentence of Patricio Homero Saenz, Jr. (Saenz). We write on only those arguments specifically set out above.

I. PROCEDURAL HISTORY

Arturo Lopez (Arturo), Francisco Lopez (Frank), Jose Luis Rodriguez (Rodriguez), and Saenz were indicted along with six other codefendants in a twenty-count indictment. The indictment charged Arturo and Frank with 17 counts (counts 2-18) of substantive offenses of possession with intent to distribute marijuana, one count (count 1) of conspiracy to import into the United States from Mexico and to possess with intent to distribute in excess of 1,000 kilograms of marijuana and possess with intent to distribute in excess of 5 kilograms of cocaine; one count (count 19) of engaging in a continuing criminal enterprise; and one count (count 20), which incorporated counts 1-19 and sought forfeiture of the proceeds of the illegal activities in the amount of $2,673,000.

Rodriguez and Saenz were also charged under count one.

Arturo, Frank, Rodriguez, and Saenz elected a jury trial, and the remaining codefendants either pleaded guilty or had the charges dismissed. The jury returned a verdict of guilty as charged as to counts 1-19 and, under count 20, a forfeiture of $2,673,000. The district court vacated the conspiracy convictions (count one) as to Arturo and Frank because that conspiracy was included as lesser offenses under the continuing criminal enterprise.

The district court sentenced the defendants as follows: Arturo to 300 months imprisonment; Frank to 240 months imprisonment; Rodriguez to 50 months imprisonment; and Saenz to 121 months imprisonment. All four defendants now appeal.

II. ANALYSIS

A. SUFFICIENCY OF EVIDENCE OF CONTINUING CRIMINAL ENTERPRISE

Arturo and Frank Lopez challenge the sufficiency of evidence to support their convictions for continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848.[1] To prove a CCE in

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[1] Section 848(c) provides that a person is engaged in a CCE if:

> (1) he violates any provision of [title 21] the punishment for which is a felony, and
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> (2) such violation is a part of a continuing series of violations of [title 21]---
>
> > (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
> >
> > (B) from which such person obtains

violation of § 848, the Government must establish that the defendant "organized, supervised or managed five or more persons in a continuing series of drug violations from which [he] obtained substantial income." United States v. Tolliver, 61 F.3d 1189, 1215 (5th Cir. 1995). Frank challenges the proof to support every element of the CCE, and Arturo contests every element except the proof to support "a continuing series of drug violations."

When reviewing the sufficiency of the evidence, we view all evidence, whether circumstantial or direct, in the light most favorable to the Government with all reasonable inferences to be made in support of the jury's verdict. United States v. Salazar, 958 F.2d 1285, 1290-91 (5th Cir.), cert. denied, __ U.S. __, 113 S.Ct. 185 (1992). The evidence is sufficient to support a conviction if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except guilt, so long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. United States v. Faulkner, 17 F.3d 745, 768 (5th Cir.), cert. denied, __ U.S. __, 115 S.Ct. 193 (1994).

(1) Leader or Organizer of Five or More Persons

Specifically, Arturo argues that the evidence establishes that Frank and/or Tono[2] were the leaders and that he merely was a

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substantial income or resources.

[2] Tono Lopez is a brother to Arturo and Frank.

subordinate to them. At the most, Arturo argues, the evidence shows that he had some supervisory control over Tim Usher (Usher) and Delfino Perez (Delfino). We are not persuaded.

Our review of the evidence convinces us that Arturo was one of the leaders of this organization and supervised many individuals during its day-to-day operations. The evidence showed that Arturo: made key decisions as to the funding and transportation of numerous drug transactions; orchestrated the release or his subordinates from custody; and decided whether operatives were sufficiently trustworthy. We take time to detail some of the evidence supporting our finding.

Raymond Gribble (Gribble) had been dealing in marijuana for years and, through that business, had been introduced to Tono Lopez, who was purported to be a new connection in Dallas for marijuana transactions. Gribble met Frank and Arturo through their brother Tono. Gribble testified that when buying marijuana from the Lopez brothers, Arturo would be the one to weigh the marijuana on the scale and count the money.

In December 1990, the police stopped Gribble, searched his car, and seized $19,000 cash. He was given a receipt for the money and he altered the receipt by changing the number to $130,000. He then "ripped off" the Lopez brothers by sending them the receipt and claiming that the police took $130,000 cash from him. As a result, he claimed that he was not able to pay them. He initially informed Tono of the seizure. Subsequently, Frank called Gribble and "said [Gribble] really messed him up." Gribble responded that

he had $30,000, and Frank "agreed to let [him] send that." Gribble also testified that Frank drove several different vehicles. On another occasion, Arturo discussed with Gribble how much money Gribble "had and what was going to take place." Arturo then made a few phone calls and left. After a few hours, he returned with two hundred pounds of marijuana.

Usher testified that Arturo arranged his first trip to Dallas, instructing him to meet Tono and pick up around sixty thousand dollars cash in a tote bag. Usher did so. On the second trip to Dallas, Arturo picked up Usher, who was carrying somewhere between sixty and seventy thousand dollars, and eventually took him to a trailer belonging to Frank. At a different time, Usher brought twenty or thirty thousand dollars to the Lopez brothers in Corpus Christi.

Usher also testified that while he was in Jacksonville with thousands of dollars, Arturo instructed him to purchase an out-of-state newspaper, tape the cash in it, and place it in the door panels of the vehicle. Usher explained that he was instructed to do so because, if the money was discovered, the police would be misled regarding its origin.

As a child, Larry Saldana (Saldana) lived in the same neighborhood as Arturo and Frank in Kingsville, Texas. In 1989, Arturo invited Saldana to come to Garland, Texas, to take over a produce business. On his way there, pursuant to Arturo's instructions, Saldana stopped in San Antonio "to pick up a load" in exchange for $1,200. While in San Antonio, Saldana rented a motel

room. Arturo came to Saldana's room and directed Saldana to give him the car keys. Arturo apparently returned the keys to Saldana, who then drove to Garland with Arturo following him in another vehicle. Although Saldana never saw the "load" in the car, he understood that it was marijuana. At a motel in Garland, Arturo again instructed Saldana to hand over his car keys. Additionally, Arturo paid Saldana either $1,200 or $1,500 for transporting the marijuana from San Antonio to Garland.

Upon moving to Garland, Saldana initially did take over Arturo's produce business. However, after about four months, the business "went down." Saldana then began driving trucks for a waste disposal company. During that time, he was "beeped" or "paged," and he returned that call to either Tono or Arturo. As a result, Saldana met Arturo and Tono in Seagoville, Texas, which was on his trucking route. Arturo "took over the truck," and they all went to meet Gribble. Saldana then agreed to transport by car a 138-pound load of marijuana for $2,500.[3] Saldana was stopped during that trip and jailed in state court. He attempted to call and talk to Arturo, but each time Arturo would hang up the phone. Subsequently, Arturo talked to Saldana and told him to be patient because they would take care of everything. Although Saldana's bond was paid, he could not testify as to who paid it.

Arturo hired Billy Joe Taylor (Taylor) to take a load of marijuana from Dallas to Florida for $1,900. On a separate trip to

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[3] Gribble's testimony regarding this same incident is set forth above.

Kingsville, Taylor was carrying a load of money and stopped to place it into Arturo's car. At that point, a patrol officer drove by causing them to proceed to another location to unload the money.

On another occasion, Arturo called Taylor and directed him to go to Delfino's house. Taylor complied, and a man (apparently Delfino) put an ice chest full of money in the trunk of Taylor's car. The chest was similar to the ones Taylor earlier conveyed. Taylor transported the chest of money to a hotel in Houston and an unidentified man took possession of it. Taylor and the unidentified man went to a restaurant next door, and the man asked for the keys to Taylor's vehicle. The vehicle actually belonged to the "Lopez brothers, but they put it in [Taylor's] name." The man subsequently returned the keys to Taylor, and Taylor drove back to Dallas. Upon arriving in Dallas, Taylor called Arturo,[4] who directed Taylor to meet him at a Texaco station.

Delfino testified that he became involved in marijuana trafficking when his friend, Caesar Fuentes (Fuentes), asked him if he was interested. Delfino responded affirmatively, and Fuentes took him to Tono's house and introduced him to Arturo. At this first meeting, Arturo pronounced Delfino "all right." A couple of days later, Fuentes called and advised Delfino to drive to Tono's house. Delfino drove there, and "they loaded the trunk" with one hundred pounds of marijuana. Delfino, along with his wife, was transporting the marijuana in exchange for $3,000. Arturo followed in another vehicle. In Pensacola, they all stayed at the Marriott

[4] Taylor had Arturo's beeper number in a date book.

Residence Inn. They then drove to Jacksonville and stayed at another Residence Inn. Arturo went to Delfino's room, picked up Delfino's car keys, and left. He came back after a couple of hours and returned the keys. During their stay, Delfino met Usher and "Walter." Those two men brought in money to Arturo, and Delfino left. Arturo subsequently contacted Delfino and they all returned to Pensacola.

On Delfino's next trip for Arturo, he used a rented Lincoln Towncar.[5] On this trip, he picked up two hundred pounds of marijuana in Corpus Christi and drove to Jacksonville. Upon arriving in Jacksonville, Delfino paged Arturo with a Skytel Pager. Delfino waited, and Usher subsequently appeared and took the car keys. Usher returned after a few hours and dropped off the keys, stating that he probably would be back the next day to retrieve the car. Usher did return again for the car and later left it at the hotel. Delfino then drove to Corpus Christi and called Arturo, who appeared and briefly took the car. Arturo returned the car and paid Delfino. Delfino drove back to Texas not knowing whether he still was carrying anything.

When Delfino arrived home, Arturo called him and informed him there was a package missing. Delfino searched the car, but found nothing. Arturo asked him "to look real good up in the wheel wells and in the trunk." Delfino looked again but found nothing. He so informed Arturo, and Arturo replied that unless Delfino "got paid

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[5] During his association with Arturo, Delfino rented other cars for Taylor. Taylor did not have the requisite credit cards.

an extra ten," there was a package missing.

Clarence Smith (Smith) began purchasing small amounts of marijuana from Arturo in 1987 or 1988. In 1990, Arturo brought a vehicle loaded with two hundred pounds of marijuana to Smith's house. Per Arturo's instructions, Smith transported the marijuana to Jacksonville, Florida. On his return to Texas, Smith delivered the payment of $50,000 cash to Arturo. For that delivery, Smith received two or three thousand dollars.

On a different occasion, Smith contacted Tono and Arturo in an attempt to obtain a large amount of marijuana ($180,000 worth) for Ron Kessinger. Arturo subsequently told Smith that there was a truck containing 800 pounds of marijuana, and he needed someone to move it. Arturo, Saenz, and another unidentified man took Smith to a house where a U-Haul truck was parked. Smith was to drive the truck to a house near Siene Road. Smith followed Arturo to the "stash house right down the road." Smith began unloading the marijuana, and some other unidentified men placed it in the attic.

The next day, Arturo picked Smith up and they waited for the drivers that were supposed to haul the marijuana to Ohio. Arturo and Smith met Robert Malone and Louis Malone (the Malones) at an Exxon station. Arturo and Smith showed the Malones where the stash house was located, and the Malones loaded the marijuana themselves. Smith testified that Arturo never actually went to the stash house on either day.

The following morning Arturo took Smith to the airport and gave him $800 to purchase a plane ticket to Columbus, Ohio. Upon

arriving in Ohio, Smith called Arturo to let him know that they (Smith and the Malones) all had arrived at the hotel. Smith also called Kessinger, who did not want to conduct the transaction until the next morning. The next morning, Kessinger picked up Smith to take him to Kessinger's house, and the Malones followed. Upon arrival, they "backed up to a barn and started unloading the marijuana." At that point, they were arrested.

Based on the foregoing, we are not hesitant to conclude that the evidence is sufficient to show that Arturo was a leader or organizer of this organization and supervised at least five individuals (Delfino, Usher, Saldana, Taylor, and Smith) in a continuing series of drug violations.

Frank likewise argues that there was no evidence that he was a leader or organizer of five or more persons in a continuing series of criminal transactions. Indeed, Frank claims that, viewing the evidence in the light most favorable to the Government, it could only be inferred that he had control over one individual, Taylor, who testified that he was hired by Frank Lopez to drive some money to McAllen, Texas.

The Government admits that there was less direct evidence that Frank, as opposed to Arturo, supervised five other persons, but nevertheless contends that it was sufficient. We agree.

Randy Easter (Easter) testified that he previously had cultivated marijuana and dealt in marijuana. He conducted "several transactions" involving "twenty-five or fifty pounds" with Frank. At one point, Frank advised Easter that he needed someone to drive.

As a result, Easter talked to Taylor and determined that Taylor was interested. Subsequently, Taylor contacted Easter, requesting him to rent a vehicle. Easter did so and received a bill from Hertz for approximately $1,800. Frank gave Easter the cash to pay the bill.

Taylor testified that he picked up money from Frank's house sometime in 1990 to take to Houston. Taylor also made similar trips to Corpus Christi and Kingsville. Subsequently, Frank purchased a motor home, and title to the vehicle was in Taylor's name. Taylor drove to Jacksonville, Florida with marijuana stored under the mattress in the motor home.

Taylor further testified that on another occasion Frank called and instructed him to come to Frank's house in Dallas, and Taylor complied. Frank loaded money in the car for Taylor to take to McAllen. Upon arriving in McAllen, Taylor beeped Arturo, and Arturo told him to proceed to Del Rio City. Arturo met Taylor on the road, and they switched vehicles.

Frank announced to Taylor "about [two] or three times he [Frank] was the boss." Taylor had problems with Frank and spoke to Arturo about those problems. Arturo informed Taylor that if he "wanted to keep working with them, [he] would have to get along with Frank."

Delfino testified that four kilos of cocaine were seized by the police after he made the delivery. Arturo apprised him that he would not be paid for driving on that trip because of the cocaine seizure. Arturo also advised him that "Frank is going to be mad."

Arturo further stated that he did not "even know if [he] should tell" Frank.

At one point, Frank stated that Delfino worked for them and that he owed money to the brothers. Because of Delfino's debt, Frank informed Arturo that he might take Delfino's house.

The evidence is sufficient to show that Frank was a leader or organizer in this drug trafficking organization. Frank was the one who took possession of large amounts of money at the close of the drug transactions. Frank was the one who called Gribble about the purported seizure of $130,000 in drug proceeds. During that conversation, Frank negotiated and decided the amount that Gribble had to send to make up for the loss. Additionally, there was evidence that Frank referred to himself as the "boss."

The question regarding whether the Government proved that Frank supervised five individuals is a closer one. As Frank concedes, there is evidence that he directly supervised Taylor. There is also evidence that he supervised Delfino and, arguably, Easter. The Government contends that the evidence shows that Frank also supervised the Malones and Saldana. We are not convinced that the evidence is sufficient to show that Frank directly supervised five individuals.

However, this Court has made clear that "[t]he CCE must not be rendered meaningless by permitting the head of a drug enterprise to insulate himself from liability by merely delegating authority to several lieutenants." United States v. Hinojosa, 958 F.2d 624, 630

(5th Cir. 1992).[6] Indeed, the evidence indicates that Frank did attempt to insulate himself from the drug transactions. Gribble testified that Frank "always seemed to come in right when the deals were done and we had everything packaged up, and he would come in for the party."

In Hinojosa, we also opined that the language of the statute constrains us to include delegated authority within the definition of § 848(c). 958 F.2d at 630. The statute does not provide that the defendant must "directly" or "personally" organize, supervise, or manage five persons. Id. Further, the words "organize," "supervise," or "manage" are set forth disjunctively in the statute.

As the Government asserts, Arturo seemed to defer to Frank, but Frank did not defer to anyone. Although the evidence indicates that the brothers were partners, it also indicates that Frank was a senior or major partner in the organization. Frank claimed to be boss, frequently appeared when the profits were to be harvested, and it would appear that members of the organization could not keep their jobs if they did not get along with Frank. Viewing the evidence in the light most favorable to the verdict, the jury could have easily concluded that Frank delegated authority to Arturo or was in charge of the overall operation, and thus, Frank was responsible for managing the same individuals that Arturo

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[6] The Fourth Circuit agrees. "[A] defendant may not insulate himself from CCE liability by carefully pyramiding authority so as to maintain fewer than five direct subordinates." United States v. Ricks, 882 F.2d 885, 891 (4th Cir. 1989), cert. denied, 493 U.S. 1047, 110 S.Ct. 846 (1990).

supervised. Accordingly, the evidence is sufficient to prove that Frank indirectly supervised at least five individuals.

(2) Substantial Income or Resources

Arturo next argues that there is no evidence that he received large profits from this venture. He contends that there is no evidence of large, expensive purchases made with drug money or any showing that the alleged drug profits were funnelled elsewhere. He does admit, however, that the Government demonstrated that he purchased a Corvette for $17,000 in cash. Frank also asserts that the Government introduced no evidence that he obtained substantial income or resources from a continuing criminal enterprise.

The Government has met its burden of proof regarding the element of the defendant obtaining substantial income from drug trafficking if it establishes "that many thousands of dollars changed hands, and that some was received by the defendant." Tolliver, 61 F.3d at 1215. Further, if the evidence demonstrates that the defendant had the resources to engage in transactions involving large sales of narcotics, the requirement has been met. Id.

Usher testified that Arturo was his source of supply and that their association lasted from June 1989 until Usher was arrested in December 1990. Upon meeting Usher, Arturo pulled Usher aside and gave Usher his number to call if Usher were interested in doing business at a later date. Usher estimated that he received somewhere between 2,000 and 2,500 pounds of marijuana from Arturo and paid about $1,050 to $1,100 per pound. Usher thought the

largest amount of money he had sent to the Lopez brothers was approximately $450,000, and the total amount of money that changed hands was "somewhere in the area of two million dollars." He further testified that "the money was being sent back to Arturo Lopez."

Similarly, Gribble testified that, at the end of one drug transaction, it was Frank who took possession of the one hundred and five thousand dollars cash that Gribble had paid for the marijuana. On another occasion, Frank took fifty thousand dollars cash from Gribble for one hundred and seventy-five pounds of marijuana. During one transaction, Gribble was attempting to negotiate the price of the marijuana, and Tono stated that his brothers had "to get their quarter out of it," which would allow the jury to infer that Frank was being paid his share of the proceeds. Gribble testified that he never dealt with any other Lopez brothers. Clearly, there was a substantial income flowing from the conspiracy to both Arturo and Frank.

(3) Continuing Series of Drug Violations

Frank argues that the evidence is insufficient to show that he engaged in a continuing series of drug violations. Instead, he asserts, the evidence indicates that, on one isolated occasion, he sold one kilogram of cocaine to an undercover officer, Frank Perez, and on three or four other occasions, he engaged in drug transactions with Easter.

To the extent that Frank is arguing there were an insufficient number of transactions, he is mistaken. This Court has held that

three predicate drug offenses suffice to prove the "continuing series" of violations element of a CCE. United States v. Hicks, 945 F.2d 107, 108 (5th Cir. 1991).

Frank further asserts that Easter's testimony regarding those three or four drug transactions was not corroborated and that Easter was unsure of when those events purportedly occurred. Contrary to Frank's assertion, the jury was allowed to credit the testimony of Easter because it has the sole responsibility for determining the weight and credibility of the evidence. United States v. Harrison, 55 F.3d 163, 165 (5th Cir.), cert. denied, __ U.S.__, 116 S.Ct. 324 (1995). As a result, we must construe all reasonable inferences from the evidence in support of the verdict. Id.

Finally, Frank argues that, while there may have been a conspiracy between Arturo and Tono and their codefendants, no evidence ties him to the conspiracy. In light of Gribble's testimony that Frank directly participated in three of the marijuana transactions he had with the Lopez brothers, this argument clearly is without merit.

Accordingly, we find that the evidence is sufficient to sustain Arturo's and Frank's convictions for engaging in a continuing criminal enterprise.

B. INSUFFICIENT EVIDENCE TO SUPPORT CONSPIRACY CONVICTION

Saenz was convicted of one count of conspiring to import and possess both marijuana and cocaine with intent to distribute. He argues that the Government failed to prove beyond a reasonable

doubt that he participated in the cocaine portion of the conspiracy.

To prove a conspiracy offense, the Government must prove beyond a reasonable doubt: (1) the existence of an agreement between two or more persons to violate the narcotics laws; that (2) each conspirator knew of the conspiracy; (3) intended to join it; and (4) did participate in the conspiracy. United States v. Magee, 821 F.2d 234, 238-39 (5th Cir. 1987). There is, however, no requirement that an overt act be proved under this conspiracy statute, 21 U.S.C. § 846. United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989).

The following evidence was revealed at trial. Robert Malone was involved with Saenz on at least three different occasions or trips where marijuana was transported. On the first trip, Malone and his father, Louis Malone, drove a load of marijuana to St. Louis. There, they met Saenz and unloaded approximately 300 pounds of marijuana. Because the buyer "couldn't handle that" much, they reloaded approximately 200 pounds of the marijuana.

Saenz and an another assistant instructed the Malones to follow them to Rock Island, and that the remainder of marijuana would be unloaded there. Apparently because of some perceived problems, they did not stop in Rock Island, but instead, drove to an unidentified house in Indiana. The marijuana then was placed in the barn. At that point, Saenz needed to go to Chicago to meet an individual who would drive the marijuana from Indiana to Chicago. Robert Malone rode with Saenz in Saenz' rented car to Chicago that

night. The next day, Saenz and Robert Malone picked up a driver who had just flown to Chicago. They rented a car for the driver, and he followed them back to the barn in Indiana.

On their second trip, the Malones drove to an Exxon gas station in Mesquite, Texas, and called a beeper number. Shortly thereafter, Saenz and Arturo "showed up." The Malones drove to the stash house, pulled the truck in the garage, and retrieved 306 pounds of marijuana from the attic. They then loaded it in the fake gas tank in the back of the truck and transported the marijuana to Ohio.

On a third occasion, Saenz called the Malones and instructed them to meet him at the same Exxon gas station, call the beeper number, and wait for someone to arrive. This trip appears to be the same one that Smith described in his testimony.

Additionally, Officer Mark Hanna, a police officer for the city of Moline, Illinois, testified that in January 1992, an investigation was initiated by a drug task force based on a tip received during a telephone call. Officer Hanna and other officers drove to the American Motor Inn in Rock Island, Illinois. They were looking for a small blue vehicle and noticed it leaving the motel parking lot as they arrived. Two agents followed the vehicle. The registration was checked, and it was discovered that the car was a rental from Hertz in Chicago.

After the vehicle was stopped, Officer Hanna arrived on the scene. Hanna encountered Saenz, and $16,000 was recovered from the vehicle. A green notebook was seized that had names (including

"Arturo") and telephone numbers in it that the members of the drug task force recognized as cocaine dealers. Also, a checking deposit slip in the name of Dr. Jesse J. Stewart was found. Officer Hanna knew Dr. Jesse Stewart because Stewart had been arrested for delivery of cocaine. Additionally, Officer Hanna was familiar with names and phone numbers in the green notebook through his previous investigations.

The evidence that Saenz joined the part of the conspiracy involving marijuana clearly is sufficient. Although there is sufficient evidence to tie him to the schemes of the Lopez organization with respect to marijuana, we find that there is insufficient evidence to prove beyond a reasonable doubt that he was involved in or connected to the cocaine portion of the Lopez brothers' conspiracy. All of Saenz' transactions involved marijuana. While the evidence might allow speculation that he was implicated in the cocaine portion of the conspiracy or cocaine transactions, such speculation is not sufficient to support a guilty verdict. Nonetheless, as discussed below, the conspiracy conviction must stand.

Anticipating that we might find the evidence as to the cocaine portion of the conspiracy insufficient, Saenz also contends that because the district court instructed the jury in the conjunctive regarding the marijuana and cocaine conspiracies, the evidence is insufficient to support the conviction.[7] "The general rule is that

[7] Saenz cites a Texas case for the proposition that the jury should have followed the district court's instructions and thus, acquitted him for failure to prove that he was involved with both

when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Turner v. United States, 396 U.S. 398, 420, 90 S.Ct. 642, 654 (1970). As stated above, we believe the evidence is sufficient to show that Saenz participated in the marijuana portion of the conspiracy. Therefore, according to the rule in Turner, Saenz' conviction must be upheld.

Additionally, we note that if Saenz' jury had been instructed in the disjunctive, there is no question that the conviction would be affirmed. In Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466 (1991), the defendant had been charged in a multiple-object conspiracy, and the evidence demonstrated that she was involved in one object of the conspiracy but not the other. The district court nevertheless disjunctively instructed the jury such that it could return a verdict against the defendant if it found that she had participated in either of the two objects of the conspiracy. The jury returned a general verdict of guilty. Relying primarily on the rule enunciated in Turner, supra, the Supreme Court rejected the defendant's due process challenge and upheld the conviction. The Court explained that because "jurors are well equipped to analyze the evidence," there is every reason to think that they would not rely on a factually inadequate theory. Griffin, 112

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objects of the conspiracy. Although that may be the law in Texas, as set forth in the text, infra, due process does not require acquittal. In light of the Supreme Court precedent discussed in the text, we decline to adopt Saenz' argument.

S.Ct. at 474 (emphasis omitted); accord United States v. Tomblin, 46 F.3d 1369, 1385 (5th Cir. 1995).

Although not controlling because the jury was instructed in the disjunctive regarding the objects of the conspiracy, Griffin informs our decision in the case at bar. Indeed, it appears that the defendant in Griffin had a stronger due process argument because the jury might have found the evidence sufficient to support the defendant's participation in the object of the conspiracy that the appellate court deemed insufficient. Griffin, however, teaches us that we are to presume that this did not occur. Instead, we are to presume that the jury based its decision on the evidence which proved beyond a reasonable doubt that the defendant participated in the particular object of the conspiracy. In the instant case, the jury found Saenz guilty of conspiring in regard to both marijuana and cocaine. Because either cocaine or marijuana satisfy the statute in question, and the evidence is sufficient to support the marijuana conspiracy, the facts of this case present a more compelling basis to sustain the conviction than did the facts in Griffin. Accordingly, we reject Saenz' due process challenge and affirm his conviction.

C. CALCULATION OF BASE OFFENSE LEVEL

Saenz raises a number of challenges to the amount of marijuana the district court used to calculate his base offense level. We have reviewed the record, and we find that, with the exception of one claim, the challenges are without merit or not properly preserved.

The district court found that, for the purpose of establishing relevant conduct under § 1B1.3, Saenz entered the conspiracy in September of 1991. Saenz argues that the district court erroneously included two loads of marijuana, totalling 650 pounds, in his base offense level under relevant conduct. Saenz contends that those two loads of marijuana were transported prior to his joining the conspiracy. Specifically, in its memorandum ruling, the district court found that two marijuana transactions in March of 1992, in which Usher had been involved, were attributable to Saenz. Saenz contends that there is no support in either the presentence report or the trial record for this finding. The Government admits that there is no support in the record for this finding, but nevertheless, asserts that we are limited to reviewing it for plain error because Saenz did not make this specific objection before the district court.

Although the Government correctly asserts that Saenz did not object to those two loads on this basis, he did object to the inclusion of those two loads, asserting that he was not responsible for them. This Court has explained that "[c]loser scrutiny may . . . be appropriate when the failure to preserve the precise grounds for error is mitigated by an objection on related grounds." United States v. Lopez, 923 F.2d 47, 50 (5th Cir.) (citation omitted), cert. denied, 500 U.S. 924, 111 S.Ct. 2032 (1991).

The record reveals that Usher's association with the Lopez organization began in June of 1989 and ended in December of 1990, when Usher was arrested. As such, contrary to the district court's

findings, it is clear that Usher could not have transported two loads of marijuana in March of 1992. Indeed, it is undisputed that Usher left the conspiracy in December of 1990, prior to Saenz joining it in September of 1991. This Court has held that the district court cannot include conduct under § 1B1.3, if that conduct occurred prior to the defendant joining the conspiracy. United States v. Carreon, 11 F.3d 1225, 1228 (5th Cir. 1994). Under that scenario, it was error for the district court to attribute to Saenz any of Usher's loads of marijuana. Therefore, Saenz' sentence is vacated and remanded for further proceedings.

With respect to the remaining arguments of the four appellants, we have considered briefs and oral arguments of counsel and the pertinent parts of the record, and conclude there is no error requiring reversal.

Accordingly, the convictions and sentences of Arturo Lopez, Frank Lopez, and Jose Rodriguez are AFFIRMED; the conviction of Patricio Saenz is AFFIRMED and his sentence is VACATED and REMANDED for further proceedings.