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

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No. 94-40764
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD WINSTON HALL,
MARKELL RAY LAZENBY,

Defendants-Appellants.

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Appeal from the United States District Court
for the Eastern District of Texas
(#1:93CR185)

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( July 10, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Defendants-Appellants Richard Winston Hall and Markell Ray Lazenby appeal their convictions by a jury in federal district

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court on drug charges under 21 U.S.C. §§ 841 and 846; and Lazenby appeals his sentence as violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Both Hall and Lazenby challenge the sufficiency of the evidence to support the convictions. Additionally, Hall complains of the district court's refusal to grant a motion to suppress evidence and the court's admission of "other crimes" into evidence; and Lazenby asserts that the district court should have granted a mistrial because of the presence and close proximity of the Deputy United States Marshal while Lazenby was testifying, and for the court's failure to grant lesser-included-offense instructions. For the reasons set forth below, we affirm the convictions and the sentences of Defendants-Appellants.

## I

## FACTS AND PROCEEDINGS

A two-count indictment charged Hall, Lazenby, and Kendrick Dean Lane with conspiracy to possess cocaine with intent to distribute and with possession of cocaine with intent to distribute. Lane pleaded guilty shortly before trial and a jury found Hall and Lazenby guilty on both counts. The district court sentenced Hall to serve two concurrent 109-month prison terms and five years on supervised release, and Lazenby to serve two concurrent 97-month prison terms and five years on supervised release. This appeal followed.

## II

## ANALYSIS

### A. Sufficiency of the Evidence

Both Hall and Lazenby argue that the evidence was insufficient. Each defendant moved for judgment of acquittal at the close of the government's case and again at the close of all of the evidence, but the district court denied all of these motions.

To prove a drug conspiracy, the government must show that (1) an agreement existed between two or more persons to violate the narcotics laws, (2) each defendant knew of the conspiracy and intended to join it, and (3) each defendant participated in it. United States v. Morris, 46 F.3d 410, 414-15 (5th Cir. 1995), pet. for cert. filed, No. 94-9280 (May 16, 1995). The existence of the conspiracy may be established by circumstantial evidence. Discrete circumstances that, standing alone, would be inconclusive may prove a conspiracy when taken together and corroborated by moral coincidences. United States v. Rodriguez-Mireles, 896 F.2d 890, 892 (5th Cir. 1990).

"To convict of possession with intent to distribute, the government must prove (1) possession of the illegal substance, (2) knowledge, and (3) the requisite intent to distribute." United States v. Cartwright, 6 F.3d 294, 299 (5th Cir. 1993), cert. denied, 115 S. Ct. 671 (1994). "Intent to distribute may be inferred from the presence of distribution paraphernalia, large quantities of cash, or the value and quality of the substance." United States v. Cardenas, 9 F.3d 1139, 1158 (5th Cir. 1993)

(internal quotation not indicated), cert. denied, 114 S. Ct. 2150 (1994). "Intent to distribute is typically inferred from the fact that an amount is too large for any purpose other than distribution." United States v. Sanchez, 961 F.2d 1169, 1176 (5th Cir. 1992), cert. denied, 113 S. Ct. 330 (1992).

Hall

Hall contends that, as to him, the evidence showed nothing more than that he was driving a car in which others possessed cocaine and in the trunk of which a jacket and a bag containing cocaine were found. He asserts that the evidence showed that his only connection with Lazenby and Lane was as driver of the car in which they were riding.

The government correctly construes Hall's brief as arguing that the evidence of possession was insufficient but not as challenging the sufficiency of the evidence of conspiracy. Hall makes no mention of the conspiracy count in his sufficiency argument to this court. When he moved for judgment of acquittal, he challenged the evidence on both the possession and the conspiracy counts, but on appeal he does not pursue his challenge to the sufficiency of the evidence of conspiracy. "Failure to prosecute an issue on appeal constitutes waiver of the issue." United States v. Green, 964 F.2d 365, 371 (5th Cir. 1992), cert. denied, 113 S. Ct. 984 (1993).

Lazenby

Lazenby contends that the evidence does not show that (1) he possessed any cocaine, (2) there was any agreement, or (3) he knew

of any agreement. Lazenby insists that the only evidence linking him to the charged crimes is his presence in the car with others who did possess cocaine and the position he was in while getting out of the car, i.e., between two persons who did possess the cocaine and a police officer. Lazenby concludes that the evidence linking him to any possession was very weak and of limited usefulness.

The Evidence

Trooper Goodwin's Testimony. Texas Trooper Wilburn Glenn Goodwin, Jr. testified as follows: On the night of October 8, 1993, he and Trooper Larry Pitts stopped a white two-door Lincoln automobile for speeding. Hall was the driver of the Lincoln; Keith Lane was the front-seat passenger; Kendrick Dean Lane was the left rear passenger, sitting behind the driver, Hall; and Lazenby was the right rear passenger, sitting behind the front right passenger, Keith Lane.

When Goodwin and Pitts stopped the car, Hall got out. Goodwin asked him for proof of insurance, and Hall returned to the car, ostensibly to get such proof; however, Hall did not have a valid insurance card. Goodwin then began writing a ticket for speeding and for failing to have proof of insurance. Hall did produce his driver's license and was cooperative.

Goodwin noticed a round piece of metal, four or five inches long, lying on the floorboard of the car, and asked Hall what it was. Hall responded that it was part of a weighted jump rope. As the metal had no holes in it, Goodwin doubted that it could be

attached to a jump rope. That prompted Goodwin to ask Hall if he had any weapons in the car, which question Hall answered in the negative.

The officers radioed for a criminal history check on Hall and on the car's registration. Hall truthfully told Goodwin that the car belonged to his mother-in-law. He also stated that he and his passengers were traveling to a family reunion in Jasper, Texas.

Goodwin then asked for and received Hall's consent to search the car, whereupon Goodwin asked the passengers to get out of the car. Kendrick Lane got out and stood against the car "spread eagle." When Keith Lane got out of the right side of the car, Goodwin saw that he was holding an object in a white wash cloth, which he was putting into a pocket of his pants. Lazenby appeared to be trying to shield Keith Lane from the view of Trooper Pitts, who was standing on the right side of the car. Goodwin pulled the wash cloth from Keith Lane's pants pocket, and a bag containing crack cocaine fell out.

Goodwin ordered all four men to lie down on the ground, and they complied. When Goodwin knelt to handcuff Keith Lane, however, Lazenby fled into a nearby wooded area. Goodwin started to pursue Lazenby, but Pitts alerted him to the fact that Hall and Kendrick Lane were beginning to get up. Goodwin consequently delayed chasing Lazenby until Pitts got into a position to watch the others. Goodwin then went into the woods and located Lazenby with the aid of a flashlight. Lazenby complied with Goodwin's order to stop and lie down. With the help of back-up officers, Goodwin and

Pitts took the four men and the Lincoln to the jail.

A video camera mounted on the dashboard of the patrol car recorded a large part of the above-described incident. Most of the facts that Goodwin described can be seen, but little sound was recorded.[1]

At the jail, Pitts conducted an inventory search of the Lincoln. He found one plastic bag containing crack cocaine in the trunk and another in a pocket of a black leather jacket that was in the trunk. A single-edge razor blade of the kind used for cutting narcotics was found under the front passenger's seat. Also in the trunk was a clip for a semi-automatic pistol.

Suspecting that Lazenby might have discarded contraband or a gun, or both, in the woods, Goodwin and Pitts returned to the wooded area that night, but found nothing. The next afternoon Goodwin went alone to the scene of the traffic stop. At the approximate spot in the woods where Lazenby had been lying on the ground, Goodwin fund two "cookies" of crack cocaine. On the bag containing the cocaine Goodwin found a pubic hair. Officers took a pubic hair from Lazenby to compare to the hair on the bag, and the two specimens turned out to be microscopically similar.

Quantities. A Texas Department of Public Safety chemist tested all crack cocaine that the officers seized. The recovered specimens weighed 37.2, 40.4, 38.3, and 45.5 grams, respectively, for a total quantity of 161.4 grams. A DEA agent testified that,

[1] The videotape was played for the jury, and a copy is in the record on appeal.

even individually, each of the four recovered specimens of cocaine were "distribution amounts."

Serologist Moreno's Testimony. Lisa Moreno, a forensic serologist with the Texas Department of Public Safety, testified that she could not absolutely identify the hair on the plastic bag as coming from Lazenby. Nevertheless, her tests of the two specimens of hair showed that the one on the bag and the one taken from Lazenby's body were microscopically similar.

Discussion

Goodwin was of the opinion that Lazenby intentionally shielded Keith Lane from Pitts' view while Keith Lane was placing the cocaine into his pants. This shielding incident is depicted on the videotape recording of the automobile stop as occurring at 8:51 p.m.

Even though, absent Goodwin's testimony that he thought that Lazenby was attempting to shield Keith Lane, the scene depicted on the videotape would not necessarily be interpreted as constituting such shielding, a review of the sufficiency of the evidence looks not to what the court sees in the tape but, rather, to what a rational juror could have seen in the tape. And, clearly, a rational juror could have accepted Goodwin's interpretation of the incident.

The government also proved that Lazenby fled from the site of the automobile stop and into the woods during the course of the arrest. "Evidence of an accused's flight is generally admissible as tending to establish guilt." United States v. Murphy, 996 F.2d

94, 96 (5th Cir.), cert. denied, 114 S. Ct. 457 (1993).

At trial, Lazenby explained that he fled out of fear when Goodwin drew his gun, but conceded on cross-examination that the videotape proves that, by the time Lazenby fled, Goodwin had returned his gun to its holster and was kneeling to handcuff Keith Lane.

Goodwin also testified that he found cocaine in the area of the woods where Lazenby had lain, and that the bag containing the cocaine had a pubic hair on it. The hair tests increased the likelihood that Lazenby had possessed the cocaine; and, as noted, a DEA agent testified that each of the four specimens of cocaine were "distribution amounts."

Lazenby was arrested with three others. Evidence indicated that he had with him and discarded a quantity of cocaine base similar to three other quantities found. Evidence further indicated that it was a quantity large enough to be intended for distribution. And, again, he attempted to flee. The jury was entitled to take all of these circumstances together to find Lazenby guilty of conspiracy. True, the evidence of possession is not overwhelming, but it is sufficient for a rational jury to believe that Lazenby was guilty of possession beyond a reasonable doubt.

Neither is the evidence on which Hall was convicted of possession strong, but it too is sufficient. "One who owns or controls a vehicle that contains contraband can be deemed to possess." United States v. Lopez, 979 F.2d 1024, 1031 (5th Cir.

1992), cert. denied, 113 S. Ct. 2349 (1993). "[W]hen the drugs are hidden, however, control alone is not sufficient to prove knowledge." United States v. Pennington, 20 F.3d 593, 598 (5th Cir. 1994). "Additional evidence of guilt may come from nervousness, inconsistent statements, implausible stories, or possession of large amounts of cash by the defendants." Id.

Pennington concerned a quantity of marijuana that was neither entirely concealed nor entirely accessible. The court looked to whether mere control of the vehicle was sufficient proof of the driver's guilt or whether additional evidence was required. Id.

In the instant case the drugs at issue were in the trunk of the car. One specimen was in the pocket of a jacket that itself was in the trunk, while another specimen was in a paper bag. We need not sort out whether or not the cocaine was concealed. If it was not concealed, Hall may be deemed to possess, and the analysis is at an end; if it was concealed, that fact would be additional evidence of his guilt.

Hall testified that Kendrick Lane had asked him to drive the Lanes to a family reunion in Jasper, Texas. As we note below, Hall was on release pending sentencing for an earlier drug conviction, so he called his Pretrial Services officer for permission to leave the area. Hall got no answer, but despite the lack of authorization to leave the area, he left anyway. The government argues that "[i]t seems implausible that Hall would assume the [risk] of getting his federal bond revoked and going to jail in order to give a friend a ride to attend a family reunion."

Goodwin testified about finding a piece of metal without holes that Hall said was part of a weighted jump rope. Goodwin could not figure how, absent holes, such metal could fit onto a jump rope. "This Court has recognized that an `implausible account of the events provides persuasive circumstantial evidence of the defendant's consciousness of guilt.'" United States v. Rodriguez, 993 F.2d 1170, 1176 (5th Cir. 1993) (quoting United States v. Diaz-Carreon, 915 F.2d 951, 955 (5th Cir. 1990)), cert. denied, 114 S. Ct. 1547 (1994).

The government also argues that the jury could have reasonably found that the jacket in the trunk belonged to Hall. Hall denied that the jacket was his, stating that the jacket was a medium and that he wore extra-large. Hall tried the jacket on for the jury, as did Kendrick Lane.

The record is unclear regarding just how the jacket fit each man. In opening argument, the AUSA mentioned the cocaine in the jacket pocket, but he did not comment on how the jacket fit Hall. In final argument, Hall's counsel told the jury that the jacket did not fit Hall but did fit Kendrick Lane. In his final argument, the AUSA did not respond to Hall's counsel's assertion that the jacket did not fit Hall. Thus the record does not really show what the jury could reasonably have inferred about the ownership of the jacket.

The government argues further, however, that still more pieces of evidence show Hall's guilt: Six months earlier he had pleaded guilty to possession with intent to distribute five kilograms of

cocaine. A single edge razor blade like those commonly used to cut crack cocaine was found under the front passenger's seat. Hall attempted to get up from the ground when Goodwin started to chase Lazenby, demonstrating that Hall was about to attempt to flee.

Each of the foregoing factors, except the ownership of the jacket, was additional evidence of Hall's guilt. As the driver of the car, he may be deemed to possess regardless of whether or not the cocaine was concealed.

Furthermore, even if possession is not attributable to Hall as the driver, the jury could still have found that he constructively possessed the cocaine. A conspirator who does not actually possess contraband may possess it constructively through his co-conspirators' actual possession. United States v. Cordero, 18 F.3d 1248, 1252 (5th Cir. 1994).

The jury had before it evidence that three of the four men in the car personally possessed cocaine. The fourth mansQHall, the driversQgave an implausible story about his reason for being in that situation. These circumstances could have led the jury to believe that Hall had conspired with the other three to possess the cocaine. If the jurors believed that Hall participated in the conspiracy, then they could have believed that he constructively possessed the four specimens of cocaine through the actual possession of his co-conspirators.

Given the circumstantial nature of the evidence of Hall's possession, our affirmance ultimately rests on the deference that appellate review affords to jury verdicts, and on the widely-

accepted theory of constructive possession through co-conspirators or the theory of the driver as possessor, or both.

B. Hall's Motion to Suppress

Hall insists that the district court should have suppressed evidence seized during and after the traffic stop. Hall filed a motion to suppress all of the evidence that was seized in connection with the arrest and all that was found at the site of the arrest. The government responded that the stop was lawful and that Hall consented to the search. After the district court held a suppression hearing at which Troopers Goodwin and Pitts testified, the motion to suppress was denied.

Hall contends that the lawful stop ended when Goodwin wrote him a speeding ticket. He asserts that, even though Goodwin was justified in the initial stop, he had no justification for continuing to detain Hall after the issuance of the ticket.

The district court foundSQand none contestsQthat the stop of the car was a valid traffic stop. Incident to that stop, the court stated, the troopers lawfully questioned Hall about his driver's license, the ownership of the car, his route of travel, and other such matters. The court determined that it was permissible for the troopers to run a computer check of Hall's driver's license, the ownership of the car, and Hall's criminal record.

The court also found that, as indicated on the videotape of the stop, Hall consented to the search at 8:51 p.m., which was immediately after the dispatcher relayed the results of the computer check to Goodwin. The district court thus ruled that the

consent was valid.

The conformity of an investigatory stop with the Fourth Amendment depends on two factors: whether the stop was justified in the first place; and whether the scope of the officer's actions during the stop was reasonably related to the circumstances that initially justified the stop. United States v. Crain, 33 F.3d 480, 485 (5th Cir. 1994) (citing Terry v. Ohio, 392 U.S. 1, 9-10 (1968)), cert. denied, 115 S. Ct. 1142 (1995). Hall concedes, as did the appellant in Crain, that the initial stop for speeding was justified.

Mere police questioning is not a seizure. Crain, 33 F.3d at 485. "Further, when questioning takes place while officers are waiting for the results of a computer check--and therefore does not extend the duration of the stop--the questioning does not violate Terry." Id. Goodwin asked for and received Hall's consent to search only seconds after receiving the results of the computer search.

The government must prove consent by a preponderance of the evidence. United States v. Hurtado, 905 F.2d 74, 76 (5th Cir. 1990) (en banc). A district court's finding of consent is reviewed for clear error, taking into account six factors that indicate whether the consent was knowing and voluntary:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

United States v. Galberth, 846 F.2d 983, 986-87 (5th Cir.), cert. denied, 488 U.S. 865 (1988). No single factor is dispositive. Id. at 987.

The district court addressed each of these factors, relying in large part on the videotape of the stop to find that Hall's consent to search was voluntary. In so doing the court determined: (1) Hall and his passengers were not free to leave ("I don't think they would have been allowed to just walk off," stated the district court); (2) the officers used no coercionSQeven though the conversations between the officers and the detainees are not audible on the videotape, the actions depicted give no hint that any coercion was used; (3) Hall cooperated with the officers, as confirmed by the videotape; (4) Hall was not informed of his right to refuse to consent; (5) as testified to by Goodwin, Hall spoke well and appeared to be intelligent; and (6) Hall believed that no incriminating evidence would be discovered (albeit the basis of that finding by the court is not apparent to us).

We conclude that the district court did not err in finding that Hall's consent was valid. Considering both the stop and the consent, the district court's denial of the motion to suppress the evidence gained during and in relation to the stop was not erroneous.

C. Evidence of Hall's "other crimes"

Hall complains that the district court improperly allowed the government to introduce evidence that he was previously convicted of a federal drug offense. Outside the presence of the jury, the

court was told by the prosecutor that he wished to show that, on April 7, 1993, Hall pleaded guilty to conspiracy to possess with intent to distribute cocaine, and that he was awaiting sentencing when arrested on the instant charges. The DEA case agent from the prior case was prepared to testify. Hall objected on the ground that the prior offense and the instant charged offense were dissimilar.

Without the jury present, the court heard the DEA agent testify about Hall's offense of, and plea of guilty to, the prior conspiracy. The court stated on the record that the government wanted to introduce the evidence to show Hall's knowledge and intent and that the two offenses were not only similar but were in fact identical. The court also held that, on balance, the probative value of the evidence was not substantially outweighed by the potential for unfair prejudice, and permitted the DEA agent to testify in the jury's presence.

"A bald assertion that the probative value of extrinsic offense evidence was substantially outweighed by its prejudicial effect does not show an abuse of discretion by the district court." United States v. Bermea, 30 F.3d 1539, 1562 (5th Cir. 1994), cert. denied, 115 S. Ct. 1113, 1825 (1995). Hall's attack on the admission of the evidence is just such a bald assertion. Furthermore, it was not the government but the defense that first brought the prior offense to the jury's attention. In his opening statement, Hall's counsel told the jurors about the prior offense. We hold that Hall has not shown abuse of discretion.

D. Proximity of Deputy U.S. Marshal to Lazenby at Trial

Lazenby argues that the district court erred in denying his motion for mistrial. He made the motion on the ground that a Deputy United States Marshal stood near him while he was testifying. Lazenby made the motion at the conclusion of his testimony. The court heard argument on the motion, then denied it.

The court recited that both Lazenby and the deputy marshal appeared in street clothing, including coats and ties. The marshal accompanied Lazenby to the witness stand and sat in a chair behind the stand. On a few occasions during his testimony Lazenby stood up to view the videotape and to make a demonstration. When he did so, the marshal also stood up and moved to stay close to him. Lazenby does not dispute the court's account of the marshal's movements.

An accused's presumed innocence requires that he be afforded the trappings of innocence at trial. For example, the defendant may not be compelled to appear in court in prison garb. United States v. Nicholson, 846 F.2d 277, 279 (5th Cir. 1988). The right to the trappings of innocence is not absolute, however; courtroom security presents a competing interest. The balancing of those competing interests is entrusted to the sound discretion of the district court. For example, a district court does not err when it permits plain-clothed security officers to accompany in court a defendant who has a history of violent behavior. Id.

As the Nicholson court stated, the standard of review is abuse of discretion. Here, the record does not show the extent, if any,

to which the marshal's conduct infringed on right to the trappings of innocence. The district court saw the proximity of the marshal to the defendant and the manner in which the deputy carried out his security function. This is unlike a case in which the prisoner appeared in shackles, an incident that may be adequately described in the record. E.g., United States v. Weeks, 919 F.2d 248, 250 (5th Cir. 1990), cert. denied, 499 U.S. 954 (1991).

In a habeas case reviewing a state trial, the Supreme Court found no constitutional deprivation when four uniformed state troopers sat in the front row of the gallery during trial. Holbrook v. Flynn, 475 U.S. 560, 568-70 (1986). A description of their movements and their possible impact on the jury was not necessary in that case, for the scene could be easily visualized.

In the instant case, though, we cannot visualize from the record the movements and presence of the deputy marshal that Lazenby challenges. In contrast, however, the district court had a direct perspective on the deputy's conduct that is vastly superior to any that an appellate court might conjure up in its imagination. Furthermore, at the time of trial, Lazenby was on pre-trial release on a state charge of attempted murder, and he had fled the scene of the traffic stop in this case. Additionally, Lazenby had been denied pre-trial release on the instant charge. Thus, as in Nicholson, information in the record indicates that the presence of security personnel was justified, and the district court's first-hand view of that presence and its effect on the jury is, like a credibility call, virtually beyond question on review.

E. Lazenby's lesser-included-offense instructions

Lazenby contends that the district court erred in not instructing the jury on the lesser-included offense of simple possession of cocaine. He requested such an instruction, but the district court denied it.

A trial court has substantial latitude in fashioning an instruction that fairly and adequately covers the issues. United States v. Allibhai, 939 F.2d 244, 251 (5th Cir. 1991), cert. denied, 112 S. Ct. 967 (1992). We will reverse for abuse of discretion only when three criteria are met: (1) a requested instruction was substantially correct, (2) the actual instruction did not substantially cover the same substance, and (3) the failure to give the requested instruction seriously impaired the defense. United States v. Arditti, 955 F.2d 331, 339 (5th Cir. 1992), cert. denied, 113 S. Ct. 597 (1992), 113 S. Ct. 980 (1993).

A "defendant may be found guilty of an offense necessarily included in the offense charged." Fed. R. Crim. P. 31(c); United States v. Deisch, 20 F.3d 139, 152 (5th Cir. 1994). A lesser-included-offense instruction is appropriate only if "(1) the elements of the offense are a subset of the elements of the charged offense and (2) the evidence at trial permits a jury to rationally find the defendant guilty of the lesser offense yet acquit him of the greater." Deisch, 20 F.3d at 142. "A lesser-included-offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." Sansone

v. United States, 380 U.S. 343, 349 (1965).

Simple possession of cocaine meets the first prong of the test as a lesser-included offense of possession of cocaine with the intent to distribute. Deisch, 20 F.3d at 152. "The offense of simple possession requires only knowing or intentional possession of a controlled substance." Id. at 153.

Lazenby was charged with possession of a controlled substance, namely, cocaine base, with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). That section criminalizes possession with intent to distribute any controlled substance, not just cocaine base. Deisch, 20 F.3d at 152. The simple possession statute is 21 U.S.C. § 844. The first sentence of § 844(a) denounces the simple possession of any controlled substance without authority; the third sentence of § 844(a) denounces the simple possession of cocaine base. We have held, accordingly, that simple possession in violation of the first sentence of § 844(a) may be a lesser-included offense of a violation of § 841(a)(1), but simple possession in violation of the third sentence of § 844(a) may not be a lesser-included offense of a violation of § 841(a)(1). Deisch, 20 F.3d at 152.

Furthermore, the only evidence in the instant case regarding whether the quantity was intended for distribution or personal use was the testimony of the DEA agent. He said that, in his opinion, each specimen was a distribution amount. Neither defendant cross-examined the DEA agent. The government argues that the only reference at trial to the possible purposes of the possession--

either distribution or personal use--was the DEA agent's testimony. Lazenby identifies nothing in the record to the contrary.

As the only evidence of the purpose for possessing the cocaine was that it was for distribution, the jury could not have rationally convicted Lazenby of the lesser-included offense of simple possession while acquitting him of possession with intent to distribute. Therefore, Lazenby was not entitled to a lesser-included-offense instruction.

Lazenby also argues that the district court erred in not giving an instruction on misprision of felony as a lesser-included offense. Lazenby requested such an instruction on the ground that misprision is a lesser-included offense of both conspiracy and possession with intent to distribute, and the district court denied the request.

The elements of misprision of felony, as criminalized in 18 U.S.C. § 4, are "(1) the defendant had knowledge that a felony was committed; (2) the defendant failed to notify authorities of the felony; and (3) the defendant took an affirmative step to conceal the felony." United States v. Adams, 961 F.2d 505, 508 (5th Cir. 1992). Without judicial contradiction, two circuit courts have expressly held that misprision is not a lesser-included offense of conspiracy. United States v. Powell, 982 F.2d 1422, 1434 (10th Cir. 1992), cert. denied, 113 S. Ct. 1356, 1874, 2361 (1993); United States v. Vasquez-Chan, 978 F.2d 546, 555 (9th Cir. 1992). We agree. Concealment is not an element of conspiracy. 21 U.S.C. § 841. Neither is it an element of possession with

intent to distribute. 21 U.S.C. § 846. Lazenby was not entitled to a lesser-included-offense instruction on misprision of felony.

F. Equal Protection and Lazenby's Sentence

Lazenby asserts that his sentence is unconstitutional. He contends that the disparity in sentences provided for offenses involving crack cocaine on the one hand and those involving powdered cocaine on the other discriminates against blacks. He acknowledges that the courts have repeatedly rejected this argument but urges that recent events require a reconsideration of the position. We would decline his invitation to revisit this well-settled matter, even if our strict stare decisis rule would permit us to do so. This court has previously rejected attacks on the disparity. United States v. Fisher, 22 F.3d 574, 579-80 (5th Cir.), cert. denied, 115 S. Ct. 529 (1994). Lazenby has identified no event that is more recent than Fisher, so this entreaty is without merit.

For the foregoing reasons, Hall's and Lazenby's convictions and sentences are

AFFIRMED.