

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-3373

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

VERSUS

ALBERTO PEREZ, MIGUEL CORTEZ, and HUMBERTO ANIBAL SUAREZ,  
Defendants-Appellants.

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Appeal from the United States District Court  
For the Eastern District of Louisiana  
(CR 91 479 L)

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April 13, 1993

Before, REYNALDO G. GARZA, WILLIAMS and JONES, Circuit Judges.

PER CURIAM:\*

Alberto Perez, Miguel Cortez, and Humberto Anibal Suarez appeal their convictions for conspiracy to distribute cocaine under 21 U.S.C. §§ 841(a) and 846. They contend that there were numerous errors made at the trial level, which warrant reversal of their convictions. Pursuant to the following reasoning we reject all of the appellants' contentions and AFFIRM the convictions and sentences handed down below.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## **FACTS**

On August 3, 1991, at 10:30 p.m., New Orleans Police Department ("NOPD") officers arrested appellant Miguel Cortez ("Cortez"). During the course of the arrest, with the aid of a drug sniffing dog, the NOPD discovered \$11,033 hidden inside the right fender well of the car. The car also contained a pager and a cellular telephone.

The NOPD were surreptitiously watching Cortez because they had received a tip. The night before, on August 2nd, Cortez had driven from Houston to New Orleans, and he stayed in the Days Inn. The morning of August 3rd, Cortez, along with several other people, left the motel and contacted Frederick Crosby ("Crosby"). The two parties set up a rendezvous at Shoney's Restaurant, where they subsequently met. Once at Shoney's, Cortez drove off in Crosby's car and surveillance was not resumed until the two returned some time later.

After the NOPD had arrested Cortez, they also searched Crosby's vehicle. Crosby tendered his consent to the officers to search his vehicle after a drug sniffing dog had alerted to it. The search uncovered 126.5 grams of cocaine. Crosby informed the officers that he had purchased the cocaine from Cortez.

After his eventful trip to New Orleans, Cortez returned to Houston. Soon thereafter, around Labor day, Cortez contacted James Singletary ("James") and inquired as to whether James would be interested in another trip to New Orleans to traffick

cocaine.<sup>1</sup> James agreed to make the trip with Cortez.<sup>2</sup> James decided to bring his brother Dale Singletary ("Dale") along for the trip because he had never been to New Orleans.

Prior to their departure, Dale and James met Cortez at a house in Bellaire, Texas, owned by Cortez' friend Queenie. Once at Queenie's house, Cortez had a conversation away from Dale and James with three white men and one black man. James identified the black man as Humberto Anibal Suarez ("Suarez"). James heard nothing that Cortez and Suarez said to each other.

Subsequently, the Singletarys drove to New Orleans in a red Mazda pick-up truck, which James had driven on previous trips to New Orleans. In the spare tire of the pick-up they had stored a large amount of cocaine. They met Cortez, Suarez,<sup>3</sup> and Cortez' friend Rachel in New Orleans. Suarez only spoke spanish and because the Singletarys did not know Spanish they could not understand his conversations with Cortez.<sup>4</sup>

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<sup>1</sup> James had made at least three trips to New Orleans with James previously; however, the August 2nd trip was not one of them.

<sup>2</sup> Cortez had previously offered to pay James \$500 per kilogram to transport cocaine to New Orleans.

<sup>3</sup> James was never formally introduced to Suarez; however, he and his brother Dale referred to him as "Lurch" because of his likeness to the television character. Moreover, James asked Cortez about Suarez, and Cortez informed him that Suarez worked with his suppliers. Cortez explained that he had problems on an earlier trip and owed his suppliers some money. Suarez was sent to insure that there would be no more "foul ups."

<sup>4</sup> In response to James' questioning about Suarez, Cortez informed him that Suarez worked with this supplier. Cortez also told James that he had problems on an earlier trip (most likely the August trip in which he was arrested), and the suppliers sent

Once in New Orleans, the Singletarys checked into the Bayou Plaza Motel. Cortez and Rachel shared one room. The Singletarys stayed in another room along with Suarez. The next day, Cortez and James rented a room at the Cinema Motel. James took the spare tire into the room where Cortez cut it open and removed the hidden cocaine. Ann, another Cortez friend, joined the two and all three drove in her car to Ann's sister's house. Inside that house Cortez met Emily Magee and Brad Daniels. Cortez sold some of the cocaine to Brad Daniels.

Cortez then apparently returned to the Bayou Plaza Hotel along with James. Later on that day, Daniels called Cortez at the Bayou complaining that the cocaine Cortez had sold him was defective because it turned brown when "cooked" into crack. Daniels contended that he would be unable to sell brown cocaine because cocaine is customarily white. In response to Daniels' phone call, Cortez, James, and Suarez drove to Daniels' house.

Once at Daniels' house, Cortez and Daniels "cooked" another batch of crack cocaine, which also turned brown. Cortez told Daniels that he would notify his suppliers about the problem and that he would be by to pick up the sample later. Cortez repeatedly spoke with Suarez in Spanish during the course of his discussion with Daniels. Further, James testified that Cortez had told him that this conversation was about the defective cocaine. Eventually, the three returned to the Bayou Plaza after their discussion with Daniels.

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Suarez along to make sure everything went smoothly.

James testified that he had met Alberto Perez ("Perez") in the restaurant of the Bayou Plaza Hotel on the evening of September 5th while he and his brother Dale were eating. After, the entourage detected that they were under surveillance they left the restaurant and went upstairs to inform Cortez. Once informed, Cortez decided to leave the hotel.<sup>5</sup>

James testified that he witnessed Cortez leave his room with cocaine and hand it to Perez with instruction to wrap it in a newspaper and place it behind the ice machine. Perez then placed the package of cocaine behind an ice machine on the fourth floor of the hotel. A subsequent search by NOPD of the fourth floor of the hotel revealed 560.2 grams of cocaine hidden behind the ice machine.

On September 5th, Jefferson Parish Police Officers stopped Perez at the New Orleans International Airport traveling under an alias. Perez was attempting to fly to Houston. Perez had left a contact number with the airlines, which was a number at the Pinnacle Motel in Gretna, Louisiana. The room number at the motel, which corresponded to the phone number, was registered to Cortez.

Officer Simone testified that during the investigation, he stopped a red Mazda truck, which contained James, his brother

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<sup>5</sup> At this point in time everyone split up and went their separate ways. James and Dale eventually ended up at the Sweets Motel. Once they were able to contact Cortez, he suggested that they check into the Pinnacle Motel. Later that night Perez informed James that he had unsuccessfully tried to fly back to Houston.

Dale, and appellant Suarez. James immediately aided the police in order to save his hide.<sup>6</sup> With James' information, the NOPD soon found Cortez and three other people in a Ford Bronco. After everyone was ordered out of the Bronco, a box containing \$20,000 was found in the floor with the aid of a drug sniffing dog.

Further, James led the NOPD to 7854 Sail Street, where he had delivered five kilograms of cocaine. The NOPD obtained a search warrant for 7854 Sail Street. The search revealed: (i) 1300 grams of powder and crack cocaine; (ii) pagers; (iii) cellular telephones; (iv) a semi-automatic pistol; (v) a triple beam balance; and (vi) \$2,937 in U.S. currency.

James also testified that sometime prior to Cortez' August arrest he had traveled with Cortez to New Orleans. James and Cortez checked into a Comfort Inn where they were met by a woman named Sophie. The next day, Cortez told James to fly back to Houston and take money back to Perez and Julio at Queenie's house. The money, which amounted to \$70,000, was taken out of the hotel safe and placed in a blue bag.

James traveled under a false name, per Cortez' instructions via Continental Airlines. Cortez wanted James to use a false name in case he was stopped with the money. Once James arrived in Houston, he went directly to Queenie's house. Eventually, he called Perez and Julio and they came to Queenie's house.

After Perez and Julio arrived at Queenie's house the three

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<sup>6</sup> James' information also led police officers to the cocaine behind the ice machine at the Bayou Plaza.

counted the money. Perez became upset with James after the money was counted because he thought the amount was \$2,000 short. Perez immediately called Cortez in New Orleans and discussed the apparent shortage. After Perez ended his conversation with Cortez he told James that he would be paid \$4,000. James complained that he was to receive more money; however, Perez insisted that on Cortez' instructions he was supposed to pay only \$4,000. There apparently was no testimony regarding where the money had come from.

#### **PROCEDURE**

Cortez, Suarez, and Perez were indicted by a grand jury in the district court for the Eastern District of Louisiana.<sup>7</sup> The indictment charged that the defendants "did knowingly and intentionally combine, conspire, confederate and agree with each other and with other persons known and unknown . . . to knowingly and intentionally possess with intent to distribute approximately two kilograms of cocaine." After a jury trial, each of the three defendants were found guilty of conspiracy to distribute and possess cocaine. The three defendants now appeal.<sup>8</sup>

#### **DISCUSSION**

There are numerous issues to be confronted on appeal: (i)

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<sup>7</sup> There were numerous other defendants indicted and tried before the jury. However, those parties are not before us on this appeal and no further mention need be made of them.

<sup>8</sup> James Singletary pleaded guilty to 18 U.S.C. § 371. Pursuant to the plea agreement he testified on behalf of the government. However, as part of the agreement none of his testimony was permitted to be used against his brother Dale.

whether there was sufficient evidence to convict Suarez and Perez; (ii) whether the government proved two separate conspiracies rather than the one conspiracy alleged in the indictment; (iii) whether prosecutorial misconduct occurred during the closing argument; and (iv) whether the district court properly applied the sentencing guidelines to Perez and Suarez.

We find that there was sufficient evidence for the jury to find that Perez and Suarez were members of the drug conspiracy. Second, there was sufficient proof for the jury to find that one conspiracy existed. Thirdly, the prosecutor's remarks during closing argument were at best harmless error. Finally, the district court's application of the sentencing guidelines was not clearly erroneous. Therefore, we AFFIRM the convictions and sentences of the three defendants.

*i. Sufficiency of the Evidence.*

Suarez and Perez contend that there was insufficient evidence against them. In essence, they argue that there were numerous innocent inferences that could have been drawn even accepting all the evidence as true.

A. Standard of Review.

When the sufficiency of the evidence is challenged, we must examine the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the jury verdict. See *United States v. Pigrum*, 922 F.2d 249, 253 (5th Cir.), cert. denied, 111 S. Ct. 2064 (1991); *United States v. Lindell*, 881 F.2d 1313, 1322 (5th Cir. 1989), cert. denied, 496 U.S. 926



(1990). Further, the appellate court does not make credibility determinations because it is within the sole province of the jury to weigh the evidence and assess the credibility of witnesses. See *United States v. Aguirre Aguirre*, 716 F.2d 293, 297 (5th Cir. 1983). Therefore, the standard really reduces to whether there is sufficient evidence that would have led a rational trier of fact to find that all of the essential elements of the offense were established beyond a reasonable doubt. See *United States v. Lechuga*, 888 F.2d 1472, 1476 (5th Cir. 1989); *United States v. Palella*, 846 F.2d 977, 981 (5th Cir.), cert. denied, 488 U.S. 863, 109 S. Ct. 162 (1988).

The elements that must be proven beyond a reasonable doubt in order to establish guilt of a conspiracy to distribute cocaine under 21 U.S.C. §§ 841 (a)(1) & 846 are as follows: (i) the existence of an agreement between two or more persons to commit one or more violations of the narcotics laws; (ii) the defendant must knowingly and intentionally join the conspiracy; and (iii) the defendant must freely and voluntarily participate in the conspiracy. See *United States v. Salazar*, 958 F.2d 1285, 1291 (5th Cir.), cert. denied, 113 S. Ct. 185 (1992); *United States v. Juarez-Fiero*, 935 F.2d 672, 677 (5th Cir.), cert. denied, 112 S. Ct. 402 (1991); *United States v. Abadie*, 879 F.2d 1260, 1265 (5th Cir.), cert. denied, 493 U.S. 1005 (1989).

Interestingly, "[u]nlike many other conspiratorial offenses, section 846 does not require proof of an overt act in furtherance of the conspiracy." *Lechuga*, 888 F.2d at 1476 (citing *United*

*States v. Hernandez-Palacios*, 838 F.2d 1346, 1348 (5th Cir. 1988); *United States v. Gardea Carrasco*, 830 F.2d 41, 44 (5th Cir. 1987)). Of course, the jury may utilize circumstantial evidence and surrounding circumstances to arrive at their decision. See *United States v. Graham*, 858 F.2d 986, 991 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1140 (1989); *United States v. Espinoza-Seanez*, 862 F.2d 526, 537 (5th Cir. 1988).

Significantly, the defendant need not have been a major force in the conspiracy. As long as the defendant is guilty of each of the elements of the crime, it does not matter that he or she was an insignificant or minor player in the final analysis. See *United States v. Gonzales*, 866 F.2d 781, 788 (5th Cir.), *cert. denied*, 490 U.S. 1093, 109 S. Ct. 2438 (1989).

B. Alberto Perez.

Perez contends that there were only four incidents from which the jury could have based his involvement in the conspiracy. The first incident, occurred some time prior to Cortez' August arrest, when James delivered the \$70,000 to Perez at Queenie's house. The second, was when Perez picked up a truck in Houston that James had driven there. The third incident involved Perez' presence at a "meeting" held in Queenie's house at which drugs were apparently not discussed.

Finally, James testified that on September 5th, he and his brother "ran into" Perez in the Bayou Plaza Hotel restaurant. Perez stated that he was just "passing through." Immediately thereafter, the three noticed that they were under DEA

surveillance so they all went upstairs to warn Cortez. James testified that he witnessed Perez leave Cortez' room with Cortez and a package of cocaine wrapped in a newspaper. At Cortez' direction, Perez placed the package behind the ice machine not far from Cortez' room, where it was later found by NOPD. Further, James testified that Perez operated under the direct instructions of Cortez.

Perez also makes numerous attempts to undermine the credibility of James Singletary. He points to: (i) discrepancies between statements at the time of his arrest and statements made at trial; and (ii) favorable treatment accorded James for "ratting" on his co-conspirators. It was solely within the jury's province to assess the credibility of James Singletary. We will not make credibility determinations at the appellate level. *Aguirre*, 716 F.2d at 297.

Surely, the jury could have found that Perez' involvement in the conspiracy dated back at least to the date in which he accepted the \$70,000 from James. During the course of that event Perez' position in the organization appeared to be superior to James' position. Additionally, the jury could have rationally found that the \$70,000 were illegal drug proceeds due to the unusually large amount. See *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 921 n.3 (5th Cir. 1992); *Salazar*, 958 F.2d at 1295. Finally, while mere presence at the scene of the crime and close association with those involved are insufficient to establish guilt standing by themselves, they are still relevant factors for

the jury to weigh in its consideration. *See United States v. Sanchez*, 961 F.2d 1169, 1174 (5th Cir.), *cert. denied*, 113 S. Ct. 330 (1992). Consequently, when Perez' role with regard to James' delivery of the \$70,000, and Perez' actions in New Orleans in September are factored in, there was surely sufficient evidence of his involvement in the conspiracy.

C. Humberto Anibal Suarez.

Suarez contends that although a conspiracy may have existed, his involvement was not established. Specifically, Suarez asserts that although the government proved: (i) that there was an agreement between two or more persons to violate the drug laws, the government failed to prove: (ii) that he knew of the conspiracy; (iii) that he intended to join the conspiracy; and (iv) that he participated in the conspiracy. The primary thrust of Suarez' argument stems from the fact that he spoke no English and no testimony established anything that he said.

Surely, Suarez' activities, when viewed as a whole, lead to the conclusion that he was more than an innocent bystander. Indeed, there need only have been sufficient proof for a rational jury to find that he was knowingly and intentionally involved in the conspiracy. The most damaging of Suarez' activities, other than staying in the hotel room with the Singletary brothers, was his trip to Daniels' house. When Daniels called to complain about the quality of the cocaine he had received, Cortez took James and Suarez along with him. Once at Daniels' house, the

four "cooked" up another batch of cocaine to demonstrate the defect. In the course of this, Cortez and Suarez spoke repeatedly in spanish. James had testified that he was told by Cortez that Suarez was a representative of his suppliers. Suarez' oversight role at the Daniels' household reinforced this testimony.

Additionally, at numerous times during the surveillance Suarez occupied a lookout post. Suarez contends that in each of these instances his conduct was ambiguous and that nothing he did was illegal. To be sure, standing on a balcony outside of a hotel room and shopping in a mall are not illegal.<sup>9</sup> However, when the jury considered the fact that Cortez had drugs in his room, that Suarez was staying with James - an admitted conspirator, and that Cortez more than confided in Suarez, it was rational to conclude that Suarez was involved. Further, Suarez' presence at Queenie's house was one more factor for the jury to weigh in its consideration, given the fact that Queenie's house had been a established site of the other conspiratorial activity.

*ii. Single Versus Multiple Conspiracies.*

The appellants' contend that the government did not prove a single conspiracy to distribute cocaine, but rather at best two unconnected incidents. Suarez and Perez rely principally on the fact that they were not involved in the August shipment of cocaine from Houston to New Orleans. Further, the argue that

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<sup>9</sup> There was testimony heard that at numerous times during the September surveillance Suarez appeared to be occupying a lookout post.

because the government alleged only a single conspiracy in the indictment, and then proved two separate conspiracies, the defendants were thereby prejudiced.

Cortez, although he was present at both the August and September incidents contends that he too was prejudiced because he was "charged with separate offenses in the same count." Therefore, he contends, that the jury did not have the option of deciding guilt or innocence on each offense separately. Cortez' argument totally lacks merit and we need only address Suarez and Perez' contentions because there was ample evidence to establish that Cortez the leader of this conspiracy from before August until September.

As a threshold matter, we note that the appellants' attorneys failed to object to the jury instruction on proof of a single conspiracy. Consequently, we will review the trial court's instruction only for plain error. See *United States v. Lokey*, 945 U.S. 825, 832 (5th Cir. 1991). Interestingly, if the jury is properly instructed, then whether the evidence shows a single or multiple conspiracy is properly within the ken of the jury. See *Gonzales*, 866 F.2d at 787; *United States v. Erwin*, 793 F.2d 656, 662 (5th Cir.), *cert. denied*, 479 U.S. 991 (1986).

The court below charged the jury that the government had to prove that a "single overall conspiracy" existed. Additionally, the court cautioned that proof of several separate conspiracies was insufficient. Then the court's instruction continued: "if you are satisfied that such a conspiracy existed, you must then

determine who were the members of that conspiracy . . ."

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." U.S. Const. amend. V. The defendants' Fifth Amendment rights were violated if the charge "permitted [the jury] to convict the defendant[s] upon a set of facts distinctly different from that set forth in the indictment." *United States v. Chandler*, 858 F.2d 254, 257 (5th Cir. 1988) (citations omitted). Moreover, a constructive amendment of the indictment has occurred if the jury is able to "convict the defendant upon a factual basis that effectively modifies an essential element of the crime charged." *Id.* (quoting *United States v. Young*, 730 F.2d 221, 223 (5th Cir. 1984)).

Turning to the evidence presented in this case we must determine whether the jury could have reasonably found that only one conspiracy existed. Three factors are used to delineate between a single conspiracy and multiple conspiracies: (i) whether there was a common goal; (ii) the nature of the scheme; and (iii) the overlap among the participants in the various dealings. *United States v. DeVarona*, 872 F.2d 114, 118 (5th Cir. 1989)). Of course, the jury may draw reasonable inferences from the evidence adduced during the trial. See, e.g., *Lokey*, 945 F.2d at 831; *Richter, S.A. v. Bank of Am. Nat'l Trust & Savs. Ass'n*, 939 F.2d 1176, 1187 (5th Cir. 1991).

Based on the evidence, Perez' first involvement pre-dated

Cortez' August arrest. Shortly before August, James Singletary testified that he delivered \$70,000 to Perez per Cortez' instructions. Additionally, a discrepancy in the amount resulted in Perez contacting Cortez directly. Although, Perez contends that there was no testimony regarding the origin of the \$70,000, it was well within the jury's discretion to regard the money as illegal drug proceeds.

Perez' actions during the events that transpired in September further rooted his membership in the conspiracy. Although Perez contends that he was just passing through New Orleans, he managed to hide over 560 grams of cocaine behind an ice machine per Cortez' request. Prior to hiding the cocaine, Perez originally went up to Cortez' room at the Bayou Plaza with the Singletarys to warn Cortez about the perceived DEA presence. Surely, a reasonable jury could have found Perez's actions were volitional and constituted overt acts in furtherance of the conspiracy. Having so concluded, the jury could have traced his involvement at least back to the time that he played a key role in the distribution of a large sum of money, which most likely found its genesis from the sale of cocaine. Therefore, a reasonable jury could have found that Perez was involved in the conspiracy from before August until September.

Applying the *DeVarona* factors to Perez also indicates that one conspiracy existed. First, the common goal was obviously distributing cocaine and avoiding detection by the authorities. Second, the members routinely brought cocaine from Houston to New



Orleans, and then funnelled the proceeds back out of New Orleans to Houston. Thirdly, Cortez was the hub of the conspiracy on the appellants' level, and Perez's actions are inextricably intertwined with Cortez at the outset and at the end of the conspiracy.

Suarez contends that if he was involved at all, there is certainly nothing to link him to any actions predating September. Again, it was well within the jury's discretion to believe James testimony that Suarez was in cahoots with Cortez' suppliers. Suarez' presence during the September events was directly related to the August events because Cortez had to be watched closely so that he did not have a similar mishap. Suarez may not have performed his oversight function very well; but nevertheless, his presence was directly linked to both drug transactions. Once again, a reasonable jury could have found that Suarez was a representative of Cortez' supplier and as a result was involved in the conspiracy from the outset.

*iii. The Prosecutor's Remarks During Closing Argument.*

The appellants also contend that statements made by the government during closing argument warrant a reversal of their convictions. The appellants derive numerous objections from the government's closing statement: (i) the prosecutor told the jury that they were representatives of the community and then pointed to the fact that numerous drug transactions take place in their community; (ii) the prosecutor referred to the defense counsel as "resourceful men;" (iii) the prosecutor alluded to the defense's

failure to call Dale Singletary; and (iv) the prosecutor referred to the race and national origin of certain defendants.

First, the appellants argue that the reference to the community led the jury to consider facts not in evidence. The court clearly cured any error that may have resulted from that statement when it instructed "I have instructed you that you are not to consider what goes on in the community . . . ." Second, the prosecutor's reference to the defense counsel surely did not "affect substantially the defendant[s'] right to a fair trial." *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989).

The prosecutor's reference to a defendant's failure to call a witness is undoubtedly improper. See *United States v. Chapman*, 435 F.2d 1245, 1247 (5th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971). However, if the defendant "opens the door," then a response from the government is permissible. See, e.g., *United States v. Sherriff*, 546 F.2d 604, 608 (5th Cir. 1977).<sup>10</sup>

Further, the jury was adequately instructed that the defendants did not need to present any evidence. Therefore, even if the remarks made by the prosecution were improper, then they were cured by the court's instructions. Finally, the appellants contend that the prosecution unfairly referred to the race and national origin of the defendants. The prosecutor referred the leadership of the organization as the "spanish guys." To be

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<sup>10</sup> During his closing argument, Perez' attorney questioned "where is Dale Singletary?" Later during the government's rebuttal the prosecutor answered "why didn't they [the defense] call Dale Singletary? . . . They can call any witness they want."

sure, the prosecution is not allowed to make racially based arguments before the jury. The comments made by the prosecutor appear to emanate from his defensible attempt to distinguish Cortez and the rest from James and his brother Dale. In any event, in this case, the comments were not prejudicial enough to constitute reversible error.

*iv. The Application of the Sentencing Guidelines.*

Perez contends that: (i) the court incorrectly based his sentence on 3,857.4 grams of cocaine (the total of the August and September shipments), rather than 560.2 grams of cocaine (the amount he hid behind the ice machine); (ii) the district court improperly enhanced his sentence because it found that he obstructed justice; and (iii) the district court erred in failing to reduce his sentence because he was a minor participation in the conspiracy. Appellant Suarez contends that the district court improperly enhanced his sentence based on his alleged organizer or leader status.

The factual findings utilized in sentencing hearings need only be established by a preponderance of the evidence. *United States v. Devine*, 934 F.2d 1325, 1339 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 954 (1992). Further, our review of the district court's application of the sentencing guidelines is for clear error only. *United States v. Angulo*, 927 F.2d 202, 205 (1991).

The prosecution proved at trial that the conspirators collectively distributed over 3800 grams of cocaine during the period alleged in the indictment. Perez contends, however, that

he should be sentenced only based on the amount of drugs that he specifically handled. Well, under U.S.S.G. § 2D1.4 Perez must be sentenced as if the object of the conspiracy has been achieved. This argument is really a reincarnated, but less forceful, variation of the single versus multiple conspiracy argument, which we rejected earlier. Certainly, the district court did not commit clear error when it based Perez' sentence on the total amount of cocaine involved in the one month time frame.

Next, Perez contends that his sentence was improperly enhanced for obstruction of justice. U.S.S.G. § 3C1.1 authorizes a two level upward adjustment if the defendant "wilfully obstructed or impeded . . . the administration of justice during the sentencing of the instant offense." Perez told the department of probation that he was born in Puerto Rico; however, he was unable to offer any evidence or help to support his contention. Further, the department could not verify his contention after an extensive search. The department decided that he hindered their presentence investigation because it became unclear whether Perez would be permitted to stay in the United States after he is released from prison. It was for the trial court to determine whether Perez was lying. Once again the trial court did not commit clear error when it adjusted Perez' sentence upward.

Finally, Perez contends that he is entitled to a reduction in his offense level because he was a minor participant. In effect, he argues that he was merely a courier. Surely, Perez occupied a higher position in the organization than James Singletary because

Perez had the power to pay him for delivering the \$70,000 cash. The district court did not commit clear error in this regard.

Suarez challenges the district court's upward adjustment of his offense level based on his perceived supervisory role. According to the testimony of James Singletary, Suarez was a representative of the supplier. Necessarily, the supplier's representative is superior to members of the lower tiers of distribution. Surely, the district court did not commit clear error in this regard.

#### **CONCLUSION**

There was sufficient evidence for the jury to conclude that Perez and Suarez were members of the conspiracy. The government forwarded enough proof for the jury to find that there was one ongoing conspiracy. Further, the prosecutor's remarks during closing argument did not infringe on any of the defendants' rights sufficient to warrant a reversal. Finally, the court applied the sentencing guidelines free of clear error. Therefore, the convictions and sentences of the appellants are in all respects AFFIRMED.