IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2831
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DEBORAH ANN GARZA,
SEVERO GARZA, JR.,
JOHNNY DAVIS, Etc.,
JOSEPH MICHAEL MASERATTI, Etc.,
BONIFACIO FILOTEO, and
RAMIRO G. ALVARADO,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-89-232-18 & 19)

(March 31, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Following our remand for resentencing, the district court re-imposed sentences on the six DefendantsSQAppellants whose convictions for drug conspiracies and substantive counts in violation of 18 U.S.C. §§ 2, 1952, and 21 U.S.C. §§ 841, 843 and 84 we previously affirmed. This time around, the Defendants-Appellants appeal their new sentences, and we find it necessary to consider the law-of-the-case doctrine, an adjustment of offense level pursuant to guidelines § 3B1.1(c) for the role of one of those defendants (Davis) in the offense, and the district court's factual findings regarding the quantities of drugs attributable to each Defendant-Appellant in connection with his or her resentencing. As explained below, we find no reversible error and therefore affirm.

I

FACTS AND PROCEEDINGS

In the prior appeal of the convictions and sentences imposed in this case, we affirmed all convictions but vacated the sentences of all Defendants-Appellants based on their respective challenges to the district court's findings regarding the amount of drugs attributable to each defendant; and we remanded for the district court to consider the recent commentaries and application notes added to U.S.S.G. § 1B1.3, relevant conduct. United States v. Maseratti (hereafter, Garza I), 1 F.3d 330, 339-40 (5th Cir. 1993), cert. denied, 114 S. Ct. 1096 (1994). These six Defendants-Appellants' convictions grew out of drug offenses stemming from a large marijuana and cocaine enterprise centered in Houston, Texas,

and operated by Roque Garcia. See id. at 334.

On remand, the district court ordered all parties to file memoranda setting forth their respective positions. In light of the filings that ensued, no additional argument was heard or evidence received at resentencing; rather, the district court informed the parties that it would make its determinations on the bases of these new filings, as the parties had had sufficient opportunities to state their positions in their memoranda.

Based on the sales notations found in the drug ledger seized from the Garzas' home, the district court found that Deborah and Severo Garza were responsible for 800 kilos of marijuana. Each had a base offense level of 26. In so doing, the district court noted that we left undisturbed its other earlier findings as to these defendants.

Based on agreements to purchase and actual purchases of these drugs from the Garcia enterprise, the district court found that Davis was responsible for 232.6 kilos of marijuana and for 2077.3 grams of cocaine. For guideline purposes, the quantity of cocaine was converted into a quantity of marijuana, with the total drug amount equaling 648 kilos of marijuana. Davis's resulting base offense level was 28. Additionally, the district court interpreted our remand directive based on relevant conduct to implicate that court's original determination on Davis's aggravated role in the offense, and overruled the government's urging for an adjustment under § 3B1.1. The district court found that, based on Davis's operation of a drug ring in Louisiana, a two-level adjustment

pursuant to § 3B1.1(c) was appropriate. The court reiterated its remaining original findings which, it noted, had been left undisturbed. In resentencing Filoteo and Alvarado, the district court found that each was responsible for 250 kilos of marijuana based on recorded telephone calls, recorded conversations from the center of operations of the Garcia conspiracy, apartment #603, see Garza I, 1 F.3d at 338, and the evidence and drugs seized. The base offense levels were 26 for each of them.

Finally, the court found that Maseratti was responsible for 320 pounds of marijuana. That resulted in a base offense level of 26 for him.

II

ANALYSIS

A. Law-of-the-Case Doctrine

Deborah and Severo Garza argue that the district court erred in adjusting by two their respective offense levels pursuant to § 2D1.1(b)(1) for possession of a dangerous weapon or firearm. Responding, the government in its appellate brief contends that this issue is foreclosed by the law-of-the-case doctrine.

> The `law of the case' doctrine generally precludes the reexamination of issues decided on appeal, either by the district court on remand or by the appellate court itself on a subsequent appeal. If an issue was decided on appeal -- either expressly or by necessary implication -- the determination will be binding on remand and on any subsequent appeal.

Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1150 (5th Cir. 1993) (citation omitted).

At the initial sentencing, the district court had overruled the Garzas' objection to the two-level adjustment pursuant to § 2D1.1(b) for use of a firearm. In Garza I we noted that among the sentencing issues raised by the appellants was "use of a firearm." Garza I, 1 F.3d at 339. After expressly addressing three other sentencing issues, we stated that review of the remaining issues on appeal indicated "no reversible error." Id. at 341. Moreover, the government noted in its response to the remand, filed in district court, that we had upheld the district court's § 2D1.1(b) ruling.

In Falcon v. General Tel. Co., 815 F.2d 317, 320 (5th Cir. 1987), we recognized the existence of three exceptions to the applicability of the law-of-the-case doctrine. But the Garzas, represented by counsel, do not argue the applicability of any of these exceptions. Therefore, we conclude that the law-of-the-case doctrine is applicable here, and that it precludes review of the § 2D1.1(b) issue. See Chevron U.S.A., Inc., 987 F.2d at 1150.

B. Role in Offense Pursuant to § 3B1.1

Davis brings several challenges to the district court's two-level increase of his offense level pursuant to § 3B1.1(c) for his role in the offense. See § 3B1.1(c) (increasing offense level by two "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b)"). Davis contends that (1) the district court's finding was precluded by the law-of-the-case doctrine, (2) the district court's actions were judicially vindictive and thus violative of the Due

Process Clause, and (3) the district court erred by failing to provide Davis with sufficient notice of its intention to adjust his offense level, pursuant to Fed. R. Crim. P. 32.

Implicit in his law-of-the-case contention is Davis's argument that the § 3B1.1 determination was beyond the scope of remand. "The scope of a remand for resentencing includes new relevant factors proper in a de novo review." United States v. Kinder, 980 F.2d 961, 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 2376 (1993). In Kinder, we cited United States v. Smith, 930 F.2d 1450, 1456 (10th Cir.), cert. denied, 502 U.S. 879 (1991), in which the Tenth Circuit concluded that its remand for resentencing, to provide the district court opportunity to explain its upward departure, was not so narrowly confined as to preclude that court's consideration of Guideline adjustments for "victim vulnerability and degree of planning."

Although the district court here originally declined to adjust Davis's offense level for his role in the offense because he was not a manager or organizer within the larger Garcia conspiracy, the court viewed our remand as a generalized vacatur of sentence so that it could consider the amendments to § 1B1.3, relevant conduct.[1] Section 3B1.1's introductory commentary refers to § 1B1.3. Moreover, we note that Davis urged the district court to re-evaluate its decision regarding his acceptance of responsibility

[1]This is arguably inconsistent with the court's declining to increase Filoteo's and Alvarado's offense levels based on use of a firearm because "the [district] court's original findings as to the other adjustments under the guidelines were undisturbed by the circuit court."

at resentencing, an issue we resolved in the original appeal. See Garza I, 1 F.3d at 341. Therefore, under controlling case law, the district court's view of the remand as allowing for reconsideration of all matters implicated by relevant conduct is not an incorrect reading of the scope of the instant remand. See Kinder, 980 F.2d at 963.

With the exception of the implicit argument addressed above, Davis did not raise his three specific §3B1.1 arguments in the district court.[2] Under Fed. R. Crim. P. 52(b), we may correct forfeited errors only when the appellant shows that (1) there is an error, (2) which is clear or obvious, and (3) which affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993)), cert. denied, 63 U.S.L.W. 3643 (U.S. Feb. 27, 1995). Even if the appellant establishes the existence of these factors, however, the decision whether to correct the forfeited error is still within the sound discretion of this courtSQdiscretion that we will not exercise unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

Parties are required to challenge errors in the district court. Only in the most exceptional case will we remedy an error after a defendant in a criminal case has forfeited the error by failing to object. Calverley, 37 F.3d at 162. The Supreme Court

[2]Davis's appellate issue does not include an argument about the substantive application of § 3B1.1.

has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. Olano, 113 S. Ct. at 1777-79.

First, an appellant who raises an issue for the first time on appeal has the burden of showing that there is actually an error, that it is plain, and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994); Fed. R. Crim. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." Calverley, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164. We lack the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

> the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, 297 U.S. 157, 56 S. Ct. 391, 80 L.Ed. 555 (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or pubic reputation of

judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, our court's discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

The law-of-the-case doctrine was not implicated by the district court's ruling regarding Davis's role. "[I]f an issue was not expressly or implicitly decided on the prior appeal, then the law of the case doctrine is inapplicable." Chevron U.S.A., Inc., 987 F.2d at 1150. The government did not appeal the district court's original determination of the § 3B1.1 issue. As for Davis's contention that he did not receive notice pursuant to Rule 32, the district court ordered all of the parties "to file . . . complete and detailed response[s] to the matters set forth by the Fifth Circuit Court of Appeals regarding . . . resentencing." In its response, the government argued that Davis's sentence should include an adjustment pursuant to § 3B1.1. That response amply served as notice to Davis. His argument is, therefore, unavailing.

The same is true of his vindictiveness claim. Due process "prohibits judicial vindictiveness on resentencing." United States v. Moore, 997 F.2d 30, 37 (5th Cir.), cert. denied, 114 S. Ct. 647 (1993). "[W]here the penalty on remand is not harsher than the original sentence, . . . `there can be no claim at all of vindictiveness upon resentencing.'" Id. at 38 (citation omitted). Davis was initially sentenced to 235 months imprisonment. Resentencing dropped his term of incarceration to 121 months. As explained above, errorsQplain or otherwisesQdid not arise in any of

the three ways contemplated by the jurisprudence. See Calverley, 37 F.3d at 162-63.

C. Drug Quantity

Each appellant challenges the district court's determination on remand of the drug quantity for which he or she was responsible. In the original sentences, the district court held each of these appellants accountable for the entire 914 kilos of marijuana that were attributed to the Garcia conspiracy. Davis was also held accountable for the entire amount of cocaine attributed to that conspiracy. See Garza I, 1 F.3d at 339-40. In light of the recent clarifying amendments to the guideline on relevant conduct, we vacated those original sentences and remanded for resentencing based on our "belie[f] that those defendants who may be involved in less than the entire conspiracy should have their sentences reexamined." Id. at 340.

"The amount of drugs for which an individual shall be held accountable at sentencing represents a factual finding, and will be upheld unless clearly erroneous." Garza I, 1 F.3d at 340.

> A finding of fact is clearly erroneous when, although there is enough evidence to support it, the reviewing court is left with a firm and definite conviction that a mistake has been committed. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently.

United States v. Bermea, 30 F.3d 1539, 1575 (5th Cir. 1994) (citations omitted), cert. denied, 115 S. Ct. 1113 (1995).

Applications of the guidelines are reviewed de novo. United States v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), cert. denied, 113 S. Ct. 2365 (1993). We shall examine seriatim as to each defendant the propriety of the drug quantities determined by the district court on remand.

1. Filoteo and Alvarado: Drug Suppliers[3]

Filoteo and Alvarado challenge the district court's finding that they were each responsible for 250 pounds of marijuana. They contend that they are responsible for only 45-46 pounds of marijuana. The government urged the district court to find Filoteo and Alvarado responsible for 250 pounds, basing its assessment of drug quantity on telephone calls recorded on June 21 and 22, 1989, between Filoteo or Alvarado and key members of the Garcia conspiracy. The organization needed 250 pounds to be ready for the arrival of the expected buyers, Tony Ayala and Maseratti. The initial sample amount supplied by Filoteo and Alvarado was 50 pounds, with subsequent negotiations for 200 pounds.

Looking at the same trial evidence, Filoteo and Alvarado contend that the sample of marijuana supplied by them to the Garcia organization was two pounds, not 50. Filoteo and Alvarado attempt to support their contention with a government exhibit, i.e., a conversation between Antonio Garcia and Roque Garcia in which Antonio informs Roque that Alvarado wanted $525 per pound and that Alvarado had "two." They add to this amount by focusing attention on the tape in question, in which $13,500 was counted, and on the

[3]See Garza I, 1 F.3d at 334.

$13,500 notation found on Alvarado's person when he was arrested. From another government exhibit, Filoteo and Alvarado glean 24 pounds based on a discussion between Roque and Antonio Garcia. Filoteo and Alvarado contend that this 24 pounds combined with the initial two pounds, divided by the amount of total cash ($13,500) closely approximates $525 per pound, the initial asking price reflected by the government exhibit in question (Their assumption that the transaction was an even exchange is questionable; there is evidence in the record that drugs were sold without an accompanying payment of the total price). To reach their total of approximately 46 pounds, Filoteo and Alvarado add the 19.6 pounds of marijuana seized when they were arrested.

It is not the function of a reviewing court to reweigh the evidence and determine whether the district court's view of the facts is correct. Our function is to determine whether the district court's findings are supported by the record. See Bermea, 30 F.3d at 1575. Moreover, a "sentencing court may make an approximation of the amount of mari[j]uana reasonably foreseeable to each defendant." United States v. Puig-Infante, 19 F.3d 929, 942 (5th Cir.), cert. denied, 115 S. Ct. 180 (1994).

The 250-pound amount is supported by the Presentence Investigation Reports (PSRs) for Alvarado and Filoteo, without including the 19 pounds of marijuana, more or less, which was seized by law enforcement agents when arresting that pair.[4] The

[4]For the description of the "offense conduct," the two PSRs contain identical information and paragraph numbers.

transcripts of the taped conversations or telephone calls, or both, indicate that the conspirators talked in code. A review of the applicable transcripts does not reveal any obvious answer as to how much marijuana was under negotiation. One plausible inference of the facts, however, supports a conclusion that the Garcias initially asked for fifty pounds of marijuana. Also plausible is the interpretation that the additional "two" that Filoteo and Alvarado had referred to meant two hundred pounds, not two pounds or two kilos. And also plausible is the deduction that the Garcias agreed to take the rest, i.e., the remaining two hundred pounds. As there is inferential support for the district court's finding in the record, and given both the standard of review and the circumstances of this case, we conclude that the district court did not clearly err in this finding. See Puig-Infante, 19 F.3d at 942.

2. Maseratti: Regular Customer of Garcia's Enterprise[5]

Maseratti, a/k/a Joseph Lester Kenley, challenges the district court's finding that he was responsible for 320 pounds of marijuana. Maseratti does not challenge his responsibility for 70 pounds. The government urged the district court to find Maseratti responsible for the entire amount of marijuana involved with the Garcia enterprise, not just the 320 pounds attributed to Maseratti SQ70 pounds from Maseratti's telephone order, and 250 pounds from the events of June 21 and 22, 1989. As to the disputed 250 pounds, Maseratti argues first that, based on the evidence, nothing indicates that he negotiated for or secured possession of 250

[5]See Garza I, 1 F.3d at 334.

pounds; and, second, that even if he did negotiate for or actually secure some marijuana, the evidence indicates that the amount was only 24 pounds, based on the $13,500 counted by the Garcia conspirators, at $525 per pound.

"[A]n individual dealing in large quantities of controlled substances is presumed to recognize that the drug organization with which he deals extends beyond his `universe of involvement.'" Puig-Infante, 19 F.3d at 942. A review of the transcripts from the recorded conversations and telephone calls on June 21 and 22, 1989, confirms that Maseratti was working with Antonio "Little `Tony'" Ayala to procure marijuana from the Garcia organization. Such a review also indicates (or a plausible interpretation of this evidence is) that Ayala and Maseratti took the original fifty that the Garcias were acquiring from Filoteo and Alvarado. Moreover, a review of an additional transcript shows that Ayala, presumably acting on behalf of Maseratti (because Ayala refers to another man's opinion that the marijuana was from a different harvest), agreed to take two hundred more. The PSR lends additional support to the district court's finding of 250 pounds of marijuana attributable to Maseratti. In light of all this, we hold that the district court did not clearly err in this finding. See United States v. Fierro, 38 F.3d 761, 773-74 (5th Cir. 1994), petition for cert. filed (U.S. Feb. 8, 1995) (No. 94-8076).

3. Davis: Regular Customer of Garcia Enterprise[6]

Davis contends that the district court erred in attributing

[6]See Garza I, 1 F.3d at 334.

232.6 kilos of marijuana and 2077.3 grams of cocaine to him. He insists that he is responsible for only 140 kilos of marijuana and 780.7 grams of cocaine. Davis characterizes the disputed amounts, approximately 92 kilos of marijuana and approximately 1300 grams of cocaine, as beyond the scope of his agreement with the conspiracy and not reasonably foreseeable by him.

In contrast, the government urged the district court to find Davis responsible for all marijuana attributable for the entire conspiracy (914 kilos) based on his extensive dealings with Roque Garcia and on Davis's knowledge of the extent of the conspiracy. In its argument, the government noted several individual transactions and drug amounts of marijuana: three trips made by Buford Lachney for Davis, accounting in the aggregate for 313 pounds of marijuana;[7] the fourth trip by Lachney from which 100 pounds could reasonably be inferred, and an additional 100 pounds from Davis's request for "a little of the other" on June 16, 1989. These amounts total approximately 232.6 kilos of marijuana.

As for cocaine, the government contended that Davis was responsible for the following amounts: the 10 ounces (283.5 grams) found in Lachney's possession when he was placed under arrest, see § 2D1.1, comment. (n.10) (conversion table stating that 1 ounce equals 28.35 grams); the one-half kilo (500 grams) that was in

[7]The 313 pounds of marijuana equals Davis's amount for which he concedes that he is responsible. § 2D1.1, comment. (n.10) (measurement conversion table listing one pound as equaling .4536 kilograms).

Davis's possession when he was arrested[8]; Davis's order for an additional one-half kilo (500 grams) after an arrest; the 16 ounces (453.6 grams) that was discussed by Davis in a recorded telephone call in which Davis is heard to agree to take what the organization had, "15, 16 cars" for $10,000; at least 2 ounces (56.7 grams) from Davis's request in a recorded telephone call for "a couple" of "white tires"; and an additional similar amount that can be reasonably inferred from Davis's further negotiations after arrest. The government correctly stated that this amount totaled approximately 2 kilos of cocaine (district court found 2077.3 grams as the proper amount of cocaine).

The gist of Davis's amount-of-cocaine argument is that the record does not support additional amounts (other than those to which he admits) because the parties never came to an agreement on the dates mentioned by the court at sentencing and because the negotiations memorialized in taped conversations never ripened into actual transactions. But a district court is allowed to make reasonable inferences from the evidence at sentencing to determine the amount of drugs and the scope of the defendant's relevant conduct. See § 1B1.3, comment. (n.2) ("In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake . . ., the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others."); § 2D1.1, comment. (n.12) ("Where there

[8]Lachney's 10 ounces and Davis's one-half kilo equal the amount which Davis contends is the correct cocaine amount.

is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance."); Puig-Infante, 19 F.3d at 942. For sentencing purposes, transactions of controlled substances are not required to be consummated. See § 2D1.1, comment. (n.12) ("In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount."). A review of the documentary evidence from the trial reflects that the district court's determination of the total cocaine quantity attributable to Davis is a plausible version of the facts, as explained by the government. See Fierro, 38 F.3d at 773-74.

The gist of Davis's amount-of-marijuana argument is that there is nothing in the record from which specific amounts of marijuana can be gleaned to support the disputed marijuana amounts. But, as we noted in the preceding paragraph, the district court is allowed to make reasonable approximations based on inferences from the record. See Puig-Infante, 19 F.3d at 942. Buford Lachney testified that he made four trips to Houston for Davis to pick up controlled substances and bring them back to Louisiana. On the first trip, Lachney brought back "two or three bags" weighing approximately 40 to 50 pounds each, thus equaling if not exceeding 100 pounds. On the second trip, when Davis was expecting 115 pounds, Lachney brought back 113 pounds. On the third trip Lachney was instructed to bring back marijuana and cocaine, but he returned with only marijuana. Davis impliedly concedes that the third

trip's quantity was 100 pounds. During Lachney's return on his fourth trip, law enforcement officers found cocaine in his possession. Davis had requested Lachney to make this trip to pick up marijuana and cocaine. When considered in the light of the other trips by Lachney, each involving at least 100 pounds, the district court was entitled to infer that Davis expected an additional 100 pounds or more of marijuana from this fourth trip, in addition to the cocaine.

Moreover, Davis ordered additional marijuana after his arrest, when he requested the two "white tires," reasonably presumed to be cocaine. Given the evidence that Davis's purchases of marijuana from the Garcia conspiracy averaged 100 pounds per transaction, the district court reasonably inferred an additional 100 pounds attributable to Davis. Considering all of the evidence under the appropriate standard of review, we conclude that the district court did not clearly err in its determination of the quantity of marijuana upon which it based Davis's sentence. See Fierro, 38 F.3d at 773-74.

4. Deborah and Severo Garza: Suppliers of Marijuana[9]

Deborah and Severo Garza challenge the district court's finding that they were responsible for 800 pounds of marijuana, a finding based on the drug amounts reflected by the drug ledger seized from them. They insist that only 140.5 pounds of the 800-pound total from the drug ledger were involved in their sales of marijuana to the Garcia organization; that the remaining 659.5

[9]See Garza I, 1 F.3d at 334.

pounds were not amounts attributable to them because these sales were not within the drug conspiracy.

The quantity of drugs under § 2D1.1(a)(3) includes "drugs with which the defendant was directly involved [under § 1B1.3(a)(1)(A)], and drugs that can be attributed to the defendant in a conspiracy as part of his `relevant conduct' under § 1B1.3(a)(1)(B) of the Guidelines." United States v. Brau, No. 93-8787 (5th Cir. Aug. 25, 1994) (unpublished; copy attached) (quoting United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994)). The district court relied on § 1B1.3(a)(1)(A) and (a)(2) in determining the 800-pound marijuana quantity, not on subsection (a)(1)(B). The jury convicted the Garzas of marijuana conspiracy and of a substantive marijuana count. Therefore, the Garzas' appellate argument SQapplying case law concerning § 1B1.3(a)(1)(B), i.e., drug quantities attributable to a defendant through the activities of co-defendants or co-conspirators which were reasonably foreseeable and were within the scope of the defendant's agreement with the othersSQis inapposite.

The Garzas do not dispute that the drug ledger shows that they sold 800 pounds of marijuana, some to the Garcia organization and some to others. As they were convicted for aiding and abetting the possession of marijuana with the intent to distribute, the district court did not err in attributing the 800-pound quantity to the Garzas in determining their respective base offense levels. See § 1B1.3(a)(1)(A).

For the foregoing reasons the sentences imposed by the

district court on remand are, in all respects, AFFIRMED.