

10-10110

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID VAUGHT,
Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Texas
Fort Worth Division
No. 4:08-CR-170-Y

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

The single issue presented is easily resolved in the government's favor based on the record and established law. Because the record is short and the legal arguments are adequately briefed, oral argument would not significantly aid the Court in its decisional process. *See* FED. R. APP. P. 34(a)(2)(C).

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BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court sentenced Vaught on January 25, 2010. (R3/580.)¹ Final judgment was entered on January 26, 2010, and Vaught timely filed his notice of appeal that same day. (R1/327-31.)

¹ The record will be cited as (R[Record Volume]/[Page Number]). R1 is the pleadings file, R2 is the trial transcript, and R3 is the sentencing transcript. The sentencing materials not included in these record volumes, such as the Presentence Report (“PSR”) and Addendum to the PSR (“Addendum”), will be cited according to their titles.

STATEMENT OF THE ISSUE

Viewed in the light most favorable to the guilty verdict and accepting all credibility choices and reasonable inferences made by the trier of fact, was the direct and circumstantial evidence sufficient to sustain a conspiracy conviction under 21 U.S.C. §§ 841 and 846?

STATEMENT OF THE CASE

On July 15, 2009, Vaught was charged in a superseding indictment with conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) – (b)(1)(A) and 846. (R1/80-83.) Vaught’s jury trial began on July 20, 2009, and lasted two full days. (R2/381-570.) Vaught moved the district court for a judgment of acquittal at the close of the government’s case, renewed his motion at the close of all evidence, and filed a written motion nine days later. (R2/535-36; R1/152-56); FED. R. CRIM. P. 29. The district court denied each of these motions. (R2/535-36; R1/291.) The jury deliberated for less than an hour before it returned a verdict of “guilty.” (R2/569.)

The district court sentenced Vaught on January 25, 2010. (R3/573-83.) At the hearing, the district court adopted the PSR’s conclusion that Vaught was a career offender and sentenced him to a “required” term of life imprisonment. (R3/578-81.)

STATEMENT OF FACTS

Vaught is a career offender who has been convicted of one robbery, two weapons violations, two thefts, and five drug offenses. (PSR ¶¶ 66-75.) Vaught was on parole for his last drug-trafficking offense when he was arrested, tried, and convicted of the present offense: conspiracy to possess with intent to distribute methamphetamine. (PSR ¶¶ 25, 74-75.) The facts most relevant to his appeal are discussed below.

Prior Drug Offenses

On April 28, 1997, Vaught sold \$50 worth of methamphetamine to two undercover officers and a confidential informant who were working with the Tyler Police Department. (PSR ¶ 71.) Two days later, Vaught sold \$140 worth of methamphetamine to another undercover officer working for the same department. (PSR ¶ 72.) On May 5, 1997, Vaught sold \$30 worth of methamphetamine to yet another undercover officer and was arrested later that same day. (PSR ¶ 73.) “During the search of defendant’s home, officers found methamphetamine in an amount of more than 4 grams but less than 200 grams.” (PSR ¶ 74.) Vaught was charged with possessing (one count) and delivering (three counts) a controlled substance in violation of Texas law. (PSR ¶¶ 71-74.) On January 13, 1998, Vaught pled guilty and was sentenced to 10 years’ deferred adjudication. (*Id.*)

Less than two years into his deferred adjudication, Vaught was arrested with over 4 grams of methamphetamine. (PSR ¶ 74.) Vaught pled guilty to possession with the intent to distribute and was sentenced to 8 years' imprisonment. (PSR ¶ 75.) On June 6, 2006, Vaught was released from prison on parole. (PSR ¶ 74.) Vaught was on parole for less than 3 years when he committed his next and final drug-trafficking offense. (*Id.*)²

Present Offense

On or about November 1, 2007, agents with the Drug Enforcement Agency ("DEA") learned of a methamphetamine trafficking conspiracy operating in Fort Worth, Texas. (PSR ¶ 10.) The leader of the conspiracy was Eric Riojas, followed by relatives and their spouses who served as couriers, bookkeepers, and dealers: Jose Luis Riojas, Sr., Jose Luis Riojas, Jr., Rogelio Luna, and Jorge Roman Pena. (PSR ¶¶ 10-12.) The DEA's year-long investigation revealed that the Riojas conspirators were smuggling large quantities of methamphetamine from Mexico and distributing it via automobiles, drug houses, and street-level dealers. (PSR ¶¶ 11-22.) From January to November 2008, the conspiracy sold at least 80 pounds of methamphetamine at prices ranging from \$16,500 to \$21,00 per pound. (PSR ¶ 13.)

² Vaught stipulated to the basic facts of his five prior drug offenses in a written document admitted as Government's Exhibit 1. (R2/474-76.)

On or about March 1, 2008, a methamphetamine user nicknamed “Marty” introduced Eric Riojas to Vaught. (PSR ¶ 23) (“Marty was a customer of Eric Riojas until he was arrested in mid-2008.”). Shortly thereafter, Eric Riojas began selling large quantities of methamphetamine to Vaught:

Vaught usually purchased one pound of methamphetamine at a time. . . and paid approximately \$16,500 per pound. On one occasion, around November 2008, Eric Riojas sold one pound of methamphetamine for approximately \$21,000.

At times, Joe Luis Riojas and Rogelio Luna conducted the methamphetamine transactions with Vaught for Eric Riojas at the Texas Moon Garage Door [at 6900 South Freeway, No. A-4, Fort Worth, Texas]. However, on one occasion, Luna delivered approximately 2 pounds of methamphetamine to Vaught in two tackle boxes at the direction of Eric Riojas.

(PSR ¶ 23.) DEA agents estimated that “Eric Riojas delivered at least 14 to 16 pounds of methamphetamine to Vaught during 2008.” (*Id.*)

On December 30, 2008, DEA agents and local police arrested the Riojas relatives: Eric Riojas, Jose Luis Riojas, Sr., Jose Luis Riojas, Jr., Rogelio Luna, and Jorge Roman Pena. (PSR ¶ 24.) Using alternative sources of supply, Vaught continued selling methamphetamine until his arrest on May 7, 2009. (PSR ¶ 25.)

Riojas Relatives Plead Guilty

On or about January 14, 2009, the members of the Riojas conspiracy were each charged with conspiring to distribute methamphetamine, in violation of 21

U.S.C. §§ 846 and 841(a)(1) and (b)(1)(B). (PSR pages IV, V.) By April 15, 2009, all of the Riojas relatives had pled guilty. (*Id.*) Vaught did not plead guilty, but instead proceeded to trial in July 2009. (R2/381-570.)

Trial

Vaught's jury trial began on July 20, 2009, and lasted two full days. (*Id.*) The government's case focused on (1) Vaught's post-arrest statements, (2) live testimony from DEA Special Agent Alan Cabano, co-conspirator Eric Riojas, and Officer Ricky Montgomery, and (3) audio recordings of Vaught's post-arrest telephone calls. (R2/469-568.) Defense counsel focused on the definition of "conspiracy," arguing time and again that the government had failed to prove that Vaught and Eric Riojas had an actual *agreement* to distribute methamphetamine. (R2/472-74; 560-66) ("[T]he only thing that's being contested was whether there was any agreement beyond buying and selling between David Vaught and Eric Riojas."). Defense counsel presented no evidence, but challenged each witness who appeared on behalf of the government. (R2/469-568.)

DEA Special Agent Alan Cabano

The government's first witness, DEA Special Agent Alan Cabano, testified about the Riojas conspiracy, its leadership, organization, and goals. (R2/477-79) ("[T]he Riojas drug-trafficking organization was distributing a large amount of

methamphetamine in the Fort Worth, Texas area.”). He also testified about Vaught’s arrest and the items found in his blue-green Lincoln Continental. (R2/483) (“We found three cellular telephones and a large amount of U.S. currency.”). Most importantly, Special Agent Cabano testified about Vaught’s post-arrest statements to law enforcement:

1. The three cellular telephones “were the cell phones he used to distribute methamphetamine.” (R2/483.)
2. “He said someone related to Eric Riojas had told him that Eric had been arrested and that he was following the case, the federal case, on the computer.” (R2/484.)
3. After seeing a photograph of Eric Riojas, he “described Eric as someone he buys methamphetamine from and described him as the top guy in the organization.” (R2/485.)
4. “He said he would purchase one pound and sometimes two pounds of methamphetamine every week for a year.” (R2/486.)
5. “He said the price ranged anywhere from \$16,000 per pound to \$29,000 per pound.” (R2/486.)
6. “[Vaught] would turn around – he would sell it by the ounce and by the quarter pound and would make approximately a \$300 profit per ounce that he sold.” (R2/487.)

Special Agent Cabano further testified that Vaught correctly identified the addresses of two businesses and one residence used by the Riojas conspiracy. (R2/487-88) (“[W]e made controlled purchases where we sent in cooperating defendants to make purchases from those locations.”). He also testified that

Vaught correctly identified Jose Luis Riojas, Sr., Jose Luis Riojas, Jr., and Rogelio Luna when presented a photo array of the Riojas relatives. (R2/489-90) (“So he was able to accurately identify each of the co-defendants who pled guilty in this case.”). Finally, he testified that Eric Riojas had Vaught’s phone numbers on his person when he was arrested on December 30, 2008. (R2/492.)

Co-conspirator Eric Daniel Riojas

Eric Riojas testified about his leadership role in the conspiracy and his transactions with Vaught. (R2/496-503.) He recalled selling Vaught one pound of methamphetamine per week for over a year. (R2/498, 502-503.) He also testified that he and Vaught frequently discussed customers, quantity, and resale methods. (R2/503.) Finally, Eric Riojas testified that Vaught would occasionally resell the methamphetamine to users who were waiting onsite. (R2/508, 512.)

Officer Ricky Montgomery

The government’s third witness, Ricky Montgomery, was an investigator with the Partker County Sheriff’s Office – the institution that detained Vaught immediately following his arrest. (R2/514.) He testified that Vaught had placed numerous telephone calls to his mother and girlfriends, seeking to retrieve and sell various quantities of methamphetamine and marijuana hidden in his car and home. (R2/515-30.) The government introduced audio recordings of these calls, using

Officer Montgomery as a sponsoring witness.³ He also testified that the Parker County Jail received a letter containing methamphetamine shortly after Vaught's calls to his mother and girlfriend. (R2/527-30.) Finally, Officer Montgomery testified that DEA agents and Sheriff's deputies executed a search warrant at Vaught's residence and seized the methamphetamine, marijuana, and money described in the recorded calls. (R2/529-30) (stating that the methamphetamine matched the "shards" described in the audio recordings).

Charge, Closing, and Conviction

The district court read its charge to the jury on July 21, 2009. (R2/538-52.) The charge included definitions of "circumstantial evidence" and "conspiracy" that matched this Court's pattern jury instructions. (R2/545-47); *see* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (Criminal) §§ 1.07 and 2.89 (West 2001). Notably, Vaught did not request and did not receive a separate instruction on the "mere buyer-seller relationship."⁴

³ *See* Government Exhibits 10, 11, 17, 20-23, 25, 34, 35, 42, and 43.

⁴ *But see* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (Criminal) § 2.89, note 10 (West 2001) ("So long as the jury instruction given by the trial court accurately reflects the law on conspiracy, there need not be a separate instruction on the defense of a 'mere buyer-seller relationship.'" (quoting *United States v. Asibor*, 109 F.3d 1023, 1034-35 (5th Cir. 1997)).

The prosecution's closing argument focused on the totality of the evidence against Vaught and the charged definition of conspiracy. (R2/552-60; 566-68) ("The government need not prove that the alleged conspirators entered into a formal agreement nor that they directly stated between themselves all the details of the scheme."). Defense counsel argued that the government failed to prove the existence of an actual agreement because there was no evidence of "exclusivity," "protection," or "supervision." (R2/567.)

The jury deliberated for less than an hour before it returned a verdict of "guilty." (R2/569.)

Sentencing

Based on a criminal history category of VI and a total offense level of 38, the PSR calculated an advisory guidelines range of 360 months to life imprisonment. (PSR ¶ 114.) However, because he had two prior controlled substance convictions, Vaught was deemed a career offender subject to a statutorily authorized sentence of life imprisonment. (PSR ¶ 114; PSR Addendum ¶ XXIV); *see also* 21 U.S.C. § 851. The district court adopted the PSR and sentenced Vaught to a "required" term of life imprisonment. (R3/578-81.)

SUMMARY OF THE ARGUMENT

Viewed in the light most favorable to the guilty verdict and accepting all credibility choices and reasonable inferences made by the trier of fact, the direct and circumstantial evidence of Vaught's prolonged and extensive cooperation with admitted drug traffickers was more than sufficient to sustain his conspiracy conviction. Vaught's sole argument – that his conspiracy conviction cannot rest solely upon “a series of one-off buys of resale quantities” – is wrong on the law and the facts.

First, the Supreme Court and this Court have both held that evidence of “prolonged cooperation” to supply large quantities of drugs over an extended period of time is, alone, sufficient to sustain a conspiracy conviction. Second, Vaught's conviction did not rest *solely* upon his purchases of resale quantities of methamphetamine, but also the constellation of circumstantial facts that proved his agreement to, knowledge of, and voluntary participation in, an ongoing drug-trafficking conspiracy. In fact, the circumstantial evidence fell into three categories deemed sufficient to sustain a conspiracy conviction under 21 U.S.C. §§ 841(a)(1) and 846: (1) common objectives, purposes, and goals; (2) quantities meant for resale; and (3) more than slight evidence of a connection to a known and ongoing conspiracy.

ARGUMENT AND AUTHORITIES

The direct and circumstantial evidence of Vaught’s prolonged and extensive cooperation with admitted drug traffickers was more than sufficient to sustain his conspiracy conviction.

Vaught challenges the sufficiency of the evidence underlying his conspiracy conviction. (Br. at 1-20.) He avers that his conviction rested upon “a series of one-off buys of resale quantities” and that this evidence alone cannot sustain a conviction under 21 U.S.C. §§ 841(a)(1) and 846. (Br. at 9-20.)

Standard of Review

Vaught preserved his sufficiency challenge by moving the district court for a judgment of acquittal at the close of the government’s case, renewing his motion at the close of all evidence, and by filing a written motion within 14 days after a guilty verdict. (R2/535-36; R1/152-56); *United States v. Izydore*, 167 F.3d 213, 219 (5th Cir. 1999); FED. R. CRIM. P. 29. “When an insufficiency-of-the-evidence claim of error is properly preserved through a motion for judgment of acquittal at trial, it is reviewed *de novo*.” *United States v. McDowell*, 498 F.3d 308, 312 (5th Cir. 2007). In so doing, this Court “must determine whether a rational jury could have found that the evidence established guilt beyond a reasonable doubt on each element of the offense.” *United States v. Solis*, 299 F.3d 420, 445 (5th Cir. 2002).

“This Court’s review of the sufficiency of the evidence is highly deferential to the verdict.” *United States v. Elashyi*, 554 F.3d 480, 492 (5th Cir. 2008) (internal marks omitted). “The evidence is viewed in the light most favorable to the verdict, accepting all credibility choices and reasonable inferences made by the trier of fact which tend to support the verdict.” *United States v. Asibor*, 109 F.3d 1023, 1030 (5th Cir. 1997). “The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence.” *United States v. Anderson*, 174 F.3d 515, 522 (5th Cir. 1999) (internal marks omitted). “Moreover, [this] standard of review does not change if the evidence that sustains the conviction is circumstantial rather than direct.” *United States v. Mitchell*, 484 F.3d 762, 768 (5th Cir. 2007) (internal marks omitted).

Discussion

“To establish a drug conspiracy under 21 U.S.C. §§ 841(a)(1) and 846, the government must prove: (1) the existence of an agreement between two or more persons to violate federal narcotics laws; (2) the defendant’s knowledge of the agreement; and (3) the defendant’s voluntary participation in the agreement.” *United States v. Gonzales*, 79 F.3d 413, 423 (5th Cir. 1996).⁵ “While it is true that

⁵ Consistent with his posture at trial, Vaught does not argue on appeal that the evidence was insufficient to sustain a conviction for possession with intent to distribute. (R1/152-56; R2/560) (Br. at 19.) Consequently, this Court need not decide the issue. *See, e.g., United States v. McKinney*, 53 F.3d 664, 672 (5th Cir. 1995).

a buyer-seller relationship, without more, will not prove a conspiracy, evidence of such activity goes to whether the defendant intended to join in the conspiracy or whether his or her participation was more limited in nature.” *United States v. Maseratti*, 1 F.3d 330, 336 (5th Cir. 1993).

Vaught argues that the government proved the existence of a buyer-seller relationship and nothing more. (Br. at 9-20.) Specifically, he avers that the government’s evidence was limited to a year-long series of “one-off buys of resale quantities” and that such evidence alone cannot sustain a conspiracy conviction. (Br. at 9-20.) Vaught is wrong on the law and the facts.

I. The Supreme Court and this Court have both held that evidence of “prolonged cooperation” to supply large quantities of drugs over an extended period of time is, alone, sufficient to sustain a conspiracy conviction.

Sensing “an issue of first impression,” Vaught asserts that this Court has not decided “whether multiple resale quantities of a controlled substance, alone, are sufficient to support a jury finding of a conspiratorial agreement.” (Br. at IV.) Vaught is mistaken. This Court has held, albeit in an unreported case, that a conspiratorial agreement may be inferred when two parties transact to buy or sell large quantities of drugs over an extended period of time:

Wyche argues that the evidence shows, at most, that he had a buyer-seller relationship with the witnesses, which is insufficient to prove a conspiracy [under 21 U.S.C. §§ 841(a)(1) and 846]. The government counters that the evidence shows more than a mere buyer-seller relationship because Wyche sold a substantial amount of drugs in standardized quantities on repeated occasions over an extended period of time to the same individuals who in-turn resold those drugs. According to the government, the jury could infer from this evidence that there was an agreement to possess with the intent to distribute.

Although, evidence of a buyer-seller relationship does not establish the existence of a conspiracy, this evidence can demonstrate the defendant's role in a conspiracy. For example, in *Direct Sales Co. v. United States*, the Supreme Court upheld the conspiracy conviction of a mail-order wholesale drug corporation that sold morphine to a small-town physician in unusually large quantities, frequently, and over an extended period. The court held that when the evidence shows the defendant was "working in prolonged cooperation" with the distributors in order to "supply them with their stock in trade . . . the step from knowledge to intent and agreement may be taken."

In the present case, the government had evidence of prolonged cooperation by Wyche to supply the witnesses with the stock they needed so they could carry on their drug trade. Therefore, a rational jury could have inferred from the evidence that Wyche was guilty beyond a reasonable doubt and the district court did not err in refusing to grant Wyche's motion of acquittal.

United States v. Wyche, 2003 WL 1922966, at *3 (5th Cir. 2003) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943)) (internal marks omitted).

Wyche is consonant with long-standing precedent in the Fifth Circuit that "the intent to distribute may be inferred from the possession of a large quantity of the drug." *United States v. Ramos-Cardenas*, 524 F.3d 600, 605 (5th Cir. 2008);

United States v. Torres, 212 Fed. Appx. 361, 366 (5th Cir. 2007) (“[T]he agreed upon amount of methamphetamine Kimes had negotiated to buy . . . was one-half pound, which Adams testified is not commonly associated with personal use but with distribution.”).

Vaught argues that *Direct Sales* is inapposite because his supplier, Eric Riojas, was indifferent to his resale operations. (Br. at 17-18.) Vaught’s argument is belied by the record. Marty introduced Vaught to Eric Riojas because he knew the latter “had methamphetamine to sell.” (R2/505.) Eric Riojas testified that his “business relationship” with Vaught centered on distributing “pound quantities of methamphetamine.” (R2/502-503.) Vaught and Eric Riojas met twice a week – for over a year – to distribute a standardized quantity of methamphetamine. (R2/498-502.) During these meetings, Vaught and Eric Riojas discussed customers, quantity, and resale methods. (R2/503.) They tacitly agreed that Vaught would have exclusive rights to the North Richland Hills area of Fort Worth. (R2/506.) In short, the evidence shows that Eric Riojas was working in “prolonged cooperation” with Vaught in order to supply him with his stock in trade: “pound quantities of methamphetamine.” (R2/503-507); *Direct Sales*, 319 U.S. at 713. Their business relationship looked nothing like the “careless” or “indifferent” buyer-seller arrangement depicted in Vaught’s brief. (Br. at 18.)

II. Vaught's conviction did not rest solely upon his purchases of methamphetamine, but also the constellation of circumstantial facts that proved his agreement to, knowledge of, and voluntary participation in, an ongoing drug-trafficking conspiracy.

Time and again, Vaught avers that his conspiracy conviction rested *solely* upon “a series of one-off buys of resale quantities.” (Br. at 2, 9-12, 19-20.)

Vaught's argument ignores the collection of circumstantial facts presented at trial. (R2/380-568.) In fact, the circumstantial evidence was overwhelming and of the very types deemed sufficient to sustain a conspiracy conviction under 21 U.S.C. §§ 841(a)(1) and 846.

This Court has “repeatedly held that circumstantial evidence alone is adequate to support a conviction of conspiracy.” *United States v. Reyes*, 227 F.3d 263, 267 (5th Cir. 2000). “Moreover, because secrecy is the norm in drug conspiracies, each element of the crime may be established by circumstantial evidence.” *United States v. Infante*, 404 F.3d 376, 385 (5th Cir. 2005). Here, the circumstantial evidence fell into three categories, any one of which would have been sufficient to sustain Vaught's conspiracy conviction.

A. Common Goals

“To be convicted of engaging in a criminal conspiracy, an individual need not know all the details of the unlawful enterprise or know the exact number or identity of all the co-conspirators, so long as he knowingly participates in some

fashion in the larger objectives of the conspiracy.” *United States v. Brown*, 553 F.3d 768, 781 (5th Cir. 2008). “An express agreement is not required; a tacit, mutual agreement with common purpose, design, and understanding will suffice.” *United States v. Infante*, 404 F.3d 376, 385 (5th Cir. 2005). “Thus, parties who knowingly participate with core conspirators to achieve a common goal may be members of an overall conspiracy, even in the absence of contact with other conspirators. *United States v. Thomas*, 12 F.3d 1350, 1357 (5th Cir. 1994).

Here, Vaught and members of the Riojas family shared the common goal of distributing methamphetamine. During his post-arrest interview, Vaught admitted purchasing “one pound and sometimes two pounds of methamphetamine every week for a year.” (R2/482.) He further admitted that the Riojas family was his source of supply and that his three cellular phones were “used to distribute methamphetamine.” (R2/483-87.) He also knew enough of the Riojas hierarchy to correctly identify the “top guy,” three soldiers, and at least three drug houses. (R2/485-90). At trial, Eric Riojas testified that he and Vaught had a “business relationship” based on “pound quantities of methamphetamine.” (R2/502-503.) He also testified that Vaught had the tacit right to sell the methamphetamine in North Richland Hills, Texas. (R2/506.) Finally, Eric Riojas testified that he and Vaught frequently discussed customers, quantity, and resale methods. (R2/503.)

Even if Vaught did not know all the details of the Riojas organization, he certainly “shared and advanced the goal of the conspiracy.” *United States v. Brown*, 553 F.3d 768, 781-82 (5th Cir. 2008).

B. Quantities Meant for Resale

As discussed above, a pure buyer-seller relationship will not suffice to sustain a conspiracy conviction. “However, evidence indicating both parties to the sale knew that the drugs were meant for resale may suffice to establish a distribution conspiracy between the parties.” *Torres*, 212 Fed. Appx. at 365 (citing *United States v. Casel*, 995 F.2d 1299, 1306 (5th Cir. 1993)).

There is no question that these parties knew that the vast majority of the methamphetamine was meant for resale. Eric Riojas testified that he and Vaught had discussed the subject in some detail:

PROSECUTOR: “Do you know how much [Vaught] was selling?”

RIOJAS: “Yes, by pounds, too, and ounces, quarters, and break[ing] it down.”

PROSECUTOR: “So he actually had conversations with you about how he was selling it?”

RIOJAS: “Yes.”

PROSECUTOR: “And the amounts he was selling it for?”

RIOJAS: “Yes.”

PROSECUTOR: “So you knew when he was buying the methamphetamine that he was going to be distributing that to others?”

RIOJAS: “Yes.”

PROSECUTOR: “Was the pound quantities of methamphetamine, is that the kind of amount that is for personal use, or is that something that people use to distribute?”

RIOJAS: “People use to distribute.”

(R2/503.) Eric Riojas also testified that Vaught would occasionally resell the methamphetamine to customers waiting onsite:

PROSECUTOR: “I may have misheard you, but did you indicate the defendant actually sold to his customers in front of you on occasion?”

RIOJAS: “Yes, he did.”

PROSECUTOR: “So he would bring people to your house, purchase methamphetamine from you, then turn around and sell it to them?”

RIOJAS: “Yes, he did.”

(R2/512.) This Court has affirmed conspiracy convictions based on far less. *See, e.g., United States v. Maseratti*, 1 F.3d 330, 338 (5th Cir. 1993) (affirming conspiracy conviction because the defendant “agreed to take all of the marijuana” and therefore “assisted in purchasing drugs for resale.”); *United States v. Santos*, 203 Fed. Appx. 613, 617 (5th Cir. 2006) (“The large amount of drugs indicated

that all parties involved knew that the cocaine was intended for resale in the Atlanta area.”).

C. Direct Evidence of a Conspiracy

“Once the government presents evidence of a conspiracy, it only needs to produce slight evidence to connect an individual to the conspiracy.” *United States v. Virgen-Moreno*, 265 F.3d 276, 285 (5th Cir. 2001) (quoting *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994)). Here, the government started with direct evidence of an ongoing drug-trafficking conspiracy:

PROSECUTOR: “Did you plead guilty to conspiring to distribute methamphetamine with a variety of people, including the defendant?”

RIOJAS: “Yes, Your Honor – I mean, yes.”

* * *

PROSECUTOR: “Who were the people working for you selling methamphetamine? What were their names?”

RIOJAS: “It was Roger Luna, Jose Luis Riojas, Jr., Jose Luis Riojas, Sr., and George Pena.”

(R2/498-99.) The subsequent evidence connecting Vaught to this conspiracy was anything but “slight.” (R2/469-537.) From Vaught’s post-arrest statements to DEA Special Agent Cabano to Eric Riojas to Officer Ricky Montgomery to the audio recordings, the government presented sufficient evidence of Vaught’s agreement to, knowledge of, and voluntary participation in, an ongoing conspiracy

to distribute methamphetamine. *United States v. Fuchs*, 467 F.3d 889, 908 (5th Cir. 2006) (“The defendant’s knowledge of and participation in the conspiracy may be inferred from a collection of circumstances.”) (internal marks omitted); *United States v. Garcia-Abrego*, 141 F.3d 142, 155 (5th Cir. 1998) (“Circumstantial evidence may establish the existence of a conspiracy, as well as an individual’s voluntary participation in it, and circumstances altogether inconclusive, if separately considered, may, by their number and joint operation be sufficient to constitute conclusive proof.”)

CONCLUSION

For the reasons above, this Court should affirm the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 16, 2010, I filed this document using this Court's ECF system, which will automatically serve Peter Smythe, counsel for David Vaught, by sending notice of electronic filing to petersmythe@federalappeals.net. I also certify that: (1) required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Matthew Kacsmark
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