No. 10-10110

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID VAUGHT, AKA "POWDER",

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION
THE HONORABLE TERRY MEANS PRESIDING

Brief of the Appellant, David Vaught

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of the case. These representations are made so that this court's judges may evaluate possible disqualification or recusal.

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Recommendation on Oral Argument

Vaught requests oral argument. The primary issue in this case is whether multiple resale quantities of a controlled substance, alone, are sufficient to support a jury finding of a conspiratorial agreement to distribute. The Seventh, Ninth, and Tenth circuits have said they are not;[1] the Eighth Circuit has said they are.[2] It appears to be an issue of first impression for this court.[3] The heightened focus of oral argument will assist the court in deciding this issue.

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[1] *United States v. Lechuga*, 994 F.2d 346 (7th Cir. 1993) (en banc), *cert. denied*, 126 L. Ed. 2d 433, 114 S. Ct. 482 (1993); *United States v. Lennick*, 18 F.3d 814 (9th Cir. 1994); *United States v. Howard*, 966 F.2d 1362, 1364 (10th Cir. 1992) ("the huge quantity of crack cocaine involved in this case permits an inference of conspiracy, but by itself this is not enough to convict the defendant").

[2] *United States v. Miller*, 91 F.3d 1160, 1162 (8th Cir. 1996).

[3] *See United States v. Maserati*, 1 F.3d 330, 336 (5th Cir. 1993) (questions of buyer/seller and conspiracy are mutually exclusive).

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No. 10-10110

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UNITED STATES OF AMERICA,

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v.

DAVID VAUGHT, AKA "POWDER",

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION
THE HONORABLE TERRY MEANS PRESIDING

Brief of the Appellant, David Vaught

Statement of Jurisdiction

This is an appeal from a conviction of 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1) and (b)(1)(A), conspiracy to possess with intent to distribute a controlled substance, rendered in the Northern District of Texas, Fort Worth Division. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has

jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The defendant timely filed his notice of appeal accordance to Rule 4(b) of the Federal Rules of Appellate Procedure.[4]

Statement of the Issue

A conspiracy to distribute between a buyer and a seller requires a separate agreement to distribute over and beyond the buy. The government proved that David Vaught bought large quantities of methamphetamine from the Riojas organization in a series of spot dealings. Can a series of one-off buys of resale quantities, without more, sustain a conspiracy conviction?

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[4] R 327, 330-349.

Statement of the Case

Nature of the Case:	Vaught was charged with a single count of Conspiracy to Possess with Intent to Distribute a Controlled Substance containing a mixture of methamphetamine of 500 grams or more (violation of 21 U.S.C. § 846; and 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)).
Trial Court:	District Court, Northern District of Texas, Fort Worth Division. The Honorable Terry R. Means presiding.
Trial Court's Disposition:	The charge was tried and a jury returned a guilty verdict. Vaught was sentenced to life imprisonment without the possibility of release.
Citations:	The record consists of one electronic volume. The record references are abbreviated as follows:

Record of Appeal:	R ___
Exhibits:	Ex. ___

Statement of Facts

David Vaught, freelance meth dealer.

David Vaught, a meth addict in Fort Worth, also sold the drug to finance his habit. He'd drive around town with cellphones and cash, in an old Lincoln Town car outfitted with a secret compartment, doing buys with a multitude of dealers.[5] He'd buy his meth in bulk—all cash—a pound or two at a time, hide it in his Lincoln's compartment, and then sell off pieces to his own customers.[6] Financing his addiction this way gave him two things: a hefty profit ($300 an ounce) and the independence to find the best deals in the marketplace.[7]

Vaught seeks to add another dealer.

Sometime in 2008, a confidential informant named "Marty," introduced Vaught to Eric Riojas.[8] Riojas was the leader of a family-run drug-trafficking organization that distributed meth in and around Fort Worth.[9] The organization was made up of at least five members, four of which were family.[10] Marty told Riojas that

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[5] *See* R 483.1-5; 500.5 to 501.2; 507.19-23.

[6] R 487.8-15.

[7] *Id.*; R 507.19-23.

[8] R 504.19 to 505.12.

[9] R 478.1-8; 485.8-14.

[10] R 478.9-14 (Eric Riojas, along with his father, Jose Luis Riojas, his brother-in-law, Rogelio Luna, and another brother, Jose Luis Riojas, Jr.).

Vaught was looking to buy some methamphetamine.[11] He didn't tell him that Vaught was looking to join the organization.

A series of one-off buys.

From that introduction, Riojas and his organization began to do business with Vaught, selling him a pound or two of methamphetamine about every week.[12] All the buys occurred essentially the same way: Riojas would call Vaught when a supply of meth had come in;[13] he'd cite the going market price;[14] and then arrange a buy at one of the organization's safe houses.[15] There, Vaught would meet with one of the organization's members,[16] and decide to buy after testing it by self-injection.[17] If he decided to go through with the sale, he'd take money out of the Lincoln's secret compartment, pay for the drugs—always cash—and stash the drugs back in the compartment.[18] Every now and again, Vaught brought one of his own customers along to cut a side deal with him once he had finished his buy from Riojas.[19]

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[11] R 498.22-23; 503.21 to 504.3.

[12] R 486.5-14; 502.19 to 503.5.

[13] R 509.19 to 510.7; 502.10-18 (Vaught's numbers were stored in Riojas's phone).

[14] R 486.21 to 487.3; 502.8-9.

[15] R 487.16 to 488.14; 499.21 to 500.4.

[16] R 491.2-4.

[17] R 501.3-18 ("So he would test the methamphetamine before he would ever take it?" "Yes., sir").

[18] *See* R 500.5 to 501.2; 509.6-18; 506.24 to 507.11.

[19] R 512.3-10.

Vaught is arrested.

Agents arrested Eric Riojas on 30 December 2009, along with the rest of the family.[20] When agents searched Jose Luis Riojas, they found a business card with the name "Powder" on it as well as two telephone numbers.[21] After some investigation, they connected the nickname "Powder" (from some movie character) to Vaught and arrested him.[22]

When they arrested him, they searched his Lincoln and found three cellphones and a lot of cash, but no methamphetamine.[23] Vaught readily admitted that he was a methamphetamine addict and that he was selling the drug, too.[24] He also admitted that he had been buying from Eric Riojas's organization (from each of the family members) for about a year, and even had followed their court cases since their arrests.[25] While he admitted to the buys, he didn't confess to participating in Riojas's conspiracy.[26]

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[20] R 478.9-18.

[21] R 479.22 to 480.2.

[22] R 493.8-10; 508.16 to 509.3 (the conspiracy had also nicknamed him "Baldy").

[23] R 483.1-5, 18-20.

[24] R 483.10-17.

[25] R 483.4-12; 490.24 to 491.4.

[26] *Compare* R 486.9-24 to 553.1-2 (government's closing statement).

While jailed pending trial, Vaught made several calls to Jamie Bruester and Ashley Humphries.[27] He asked them to send him some of his "own shit"— he was a methamphetamine addict going cold turkey.[28] (Investigators later intercepted a letter containing a gram or less of methamphetamine.[29]) In one of his calls to Humphries, he talked *cake mix*, *shards*, and *balls*—methamphetamine slang—about what she had with her and she asked him if he wanted her to sell some of it.[30] He answered, "Yeah, hell, yeah."[31] Investigators later tracked her calls to a house that he had leased. [32] After obtaining a warrant, they found and seized a batch of methamphetamine.[33]

Motion for acquittal is denied.

After the government presented its evidence at trial, Vaught moved for acquittal under Rule 29.[34] The court denied the motion.[35] The jury returned a guilty verdict on count one, and he re-urged the motion, arguing that the government had

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[27] R 516.9 to 517.9.

[28] R 522.23 to 523.7; 523.19-21.

[29] R 515.2-14; 526.19-25; 527.15-20; 531.13-19.

[30] R 524.20 to 526.6; Ex. 35.

[31] Ex. 35.

[32] R 527.21 to 528.19 (agents found Vaught's lease agreement).

[33] R 528.19-25; 529.11-24; 530.5-12.

[34] R 535.8-25.

[35] *Id.*; *see also* 536.10-25.

only proven a buy/sell relationship, not a conspiratorial agreement.[36] The court denied the motion again, holding that there was clearly sufficient evidence for the jury to conclude that Vaught had conspired with Eric Riojas "and others."[37]

Life without possibility of release.

At sentencing, the government proffered Vaught's prior drug felony convictions pursuant to 21 U.S.C. § 851.[38] The court sentenced Vaught to a mandatory term of life without possibility of release.[39]

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[36] R 152-154.

[37] R 291.

[38] R 575.21 to 577.15.

[39] R 578.19 to 582.15.

Summary of Argument

For about a year, David Vaught bought resale quantities of methamphetamine from Eric Riojas's drug-trafficking organization. But those sales didn't turn him into Riojas's co-conspirator. A conspiratorial agreement to distribute needs more than a sale. It needs more than knowledge of a buyer's intent to redistribute. It needs an agreement between buyer and seller in which the object is for the buyer to further distribute the drug after the buy.

When Riojas sold to Vaught, his involvement stopped at the point of sale. He didn't try to stimulate Vaught's resales nor did he encourage further distribution down the line. He, in fact, didn't care what Vaught did with the methamphetamine once he had paid his cash for it. This lack of concern, this lack of inciting Vaught to further distribute the methamphetamine, renders the government's evidence insufficient to support a conviction for conspiracy to possess to distribute. Consequently, Vaught's conviction should be reversed.

Argument

> A conspiracy to distribute between a buyer and a seller requires a separate agreement to distribute over and beyond the buy. The government proved that David Vaught bought large quantities of methamphetamine from the Riojas organization in a series of spot dealings. Can a series of one-off buys of resale quantities, without more, sustain a conspiracy conviction?

Standard of review.

Vaught must prove that the jury findings on the existence of a conspiratorial agreement were clearly wrong.[40] He can carry this burden.

Given the verdict, this Court is to view all the evidence—direct or circumstantial—in the light most favorable to the prosecution.[41] But it must examine the entire record to ensure that the conviction rests on inferences reasonably drawn from the evidence and not just on mere speculation.[42] And only when the record reasonably supports a conviction beyond a reasonable doubt may this Court affirm the conviction.[43]

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[40] *See United States v. Percel,* 553 F.3d 903, 910 (5th Cir. 2008).

[41] *Jackson v. Virginia,* 443 U.S. 307, 309 (1979).

[42] *United States v. Schuchmann,* 84 F.3d 752, 753 (5th Cir. 1996).

[43] *Jackson,* 443 U.S. at 309.

The element of intent of a conspiratorial agreement must be established by clear evidence;[44] the government must have done more than pile on inference upon inference.[45] For instance, a showing that Vaught merely associated with conspirators or could be found "in a climate of activity that reeks of something foul" wouldn't suffice for affirmance.[46] And if the evidence tends to give equal or nearly equal circumstantial support to guilt or innocence, this Court must reverse.[47]

A conspiracy requires an agreement beyond the buy.

A conspiracy is not just an agreement. It's an agreement with a particular kind of object or design: to commit a crime.[48] When the sale of a controlled substance is the substantive crime, the sale itself can't form the conspiracy [to distribute], for it has no separate criminal object.[49] That is why the questions of whether a defendant is a buyer or seller, and whether he is a member of a conspiracy are mutually exclusive.[50] What's required for a conspiracy [to distribute] in a sales case is a

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[44] *See Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

[45] *Id.* at 1681; *United States v. Cardenas-Alvarado*, 806 F.2d 566, 570 (5th Cir. 1986).

[46] *Cardenas-Alvarado-*, 806 F.2d at 569-70.

[47] *United States v. Ramos-Cardenas*, 524 F.3d 600, 605 (5th Cir. 2008).

[48] *Lechuga*, 994 F.2d at 349.

[49] *Id.*

[50] *United States v. Maserati*, 1 F.3d 330, 336 (5th Cir. 1993).

separate *agreement* that goes beyond the sale, itself; a seller's mere knowledge that his buyer intends to redistribute the buy isn't enough.[51]

Here, the government was required to prove the existence of a conspiratorial agreement between Vaught and the Riojas organization (no unknowns were named in the indictment) to distribute 500 grams or more of methamphetamine.[52] It presented evidence of a series of freelance buys over a year period, but it didn't prove Vaught's involvement in a conspiratorial agreement over and beyond those buys.

When Vaught first met Riojas, he wasn't seeking a joint venture, partnership, or even exclusive arrangement; he just wanted to buy some methamphetamine.[53] Riojas obliged, but just with an open offer to sell at prevailing market prices when he had it to sell.[54] There were no prearranged deals. Whenever he was able to procure some, he'd call Vaught, offer him a price, and arrange to consummate the transactions at one of his safehouses.[55] Vaught, in turn, wouldn't buy just straight off the phone. He'd drive to the designated safehouse, test the methamphetamine by

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[51] *Id.; see also United States v. Boidi*, 568 F.3d 24, 30 (1st Cir. 2009) (knowledge that a buyer intends to resell the product doesn't necessarily establish his inclusion in the seller's conspiracy).

[52] R 80-81.

[53] R 498.22-23.

[54] R 486.21-24; 503.14-16; 509.19-23.

[55] R 503.14-16; 509.10-24; 511.3-13.

injecting himself with it (every time), and then decide whether to buy.[56] And, when he did, he used cash. Riojas never had to front a sale or extend him credit. Ever.[57]

Insofar as there was an agreement between them to buy and sell, there was nothing more to suggest that their deals ever evolved into anything more than a series of spot buys.[58] Over the course of that year, through conversations, Riojas became aware that Vaught was selling off pieces of the pound sales to his own customers and the kinds of profits Vaught was making, but that didn't matter to him. He never sought to stimulate those sales or empower Vaught to further distribute down the line.[59] He didn't care whether Vaught used it himself or decided to sell it to others.[60] His involvement with Vaught ended at the point of sale. At bottom, they both may have been guilty—Riojas of distribution and Vaught of possession, or even possession with intent to distribute—but they weren't coconspirators.[61]

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[56] R 501.3-18.

[57] R 506.24 to 507.11.

[58] The government elicited testimony about an exclusive area, but it was clear that Riojas and Vaught never had such an agreement. R 505.21 to 506.15.

[59] R 503.14-16; 507.24 to 508.4. *Compare Lennick*, 18 F.3d at 819 (proof that a defendant sold drugs to other individuals doesn't prove conspiracy) *and Lechuga*, 994 F.2d at 349 (seller, merely by selling, would not have been agreeing with some further sale) *with Direct Sales*, 319 U.S. at 713 (conspiracy requires joining "both hand and mind" to invigorate further sales).

[60] R 508.5-15.

[61] *United States v. Moran*, 984 F.3d 1299, 1303 (1st Cir. 1993).

Vaught's side deals didn't create a conspiratorial agreement.

At the same time, one might argue that a conspiracy did form when Vaught brought his own customers to Riojas's safehouses.[62] Under that theory, a conspiracy arose in these instances because Riojas knew precisely what Vaught was going to do with at least part of the drugs that he sold him.[63]

But that argument fails for two reasons. First, there is a wide gulf between knowledge and conspiracy; possessing the knowledge that a buyer will redistribute isn't the same as sharing the purpose to redistribute with him.[64] Vaught's and Riojas's transactions were stochastic events by themselves. And Vaught's tag-along sales were even more haphazard. There was nothing to suggest that the presence of Vaught's customers changed the buyer-seller dynamics of Vaught's own buys.[65] Vaught remained one of Riojas's "best customers" with or without his tag-alongs.[66]

Second, even if a conspiracy arose because of those few instances, they wouldn't meet the indictment's 500 gram threshold.[67] Vaught wasn't charged with

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[62] R 505.10-11.

[63] *See Lechuga*, 994 F.2d at 348.

[64] *United States v. Falcone*, 311 U.S. 205, 209 (1940); *Boidi*, 568 F.3d at 30 (mere knowledge of what buyer would do with product isn't enough; seller must share the purpose to redistribute).

[65] *See United States v. Moran*, 984 F.2d at 1303 (conspiracy not present without prearrangement and with no idea of or interest in its intended use); *cf. Falcone*, 311 U.S. at 209-10 (act of supplying with knowledge of what customers would do with purchased goods didn't amount to conspiracy).

[66] R 511.14-21.

[67] *See* R 80-81.

just conspiracy to distribute, but with conspiracy to distribute 500 grams or more. The government failed to establish the number of times that Vaught brought tag-along customers or even how much methamphetamine he turned around to sell them. So, even if there was a conspiratorial agreement to redistribute under these circumstances, there is insufficient evidence to show that it amounted to 500 grams or more of methamphetamine.

Quantity didn't change the dynamics of the relationship.

On the other hand, one might say that Vaught's buys alone—a pound or two a week for a year—were sufficient in and of themselves to make a submissible case of conspiracy to distribute.[68] Under this line of thinking, once the government proved Vaught's receipt of resale quantities totaling over 500 grams, the jury could find the existence of the charged conspiracy without more. Indeed, this argument appears to be the government's main theory.[69]

The court should reject this argument, not only because it's a minority position,[70] but because it is antithetical to this court's previous analysis of conspiratorial agreements. In *United States v. Maserati,*[71] this court observed that the

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[68] *See United States v. Miller,* 91 F.3d 1160, 1162 (8th Cir. 1996).

[69] R 470.4-14.

[70] *See Miller*, 91 F.3d at 1162, *citing United States v. Lennick*, 18 F.3d 814 (9th Cir. 1994); *United States v. Lechuga*, 994 F.2d 346 (7th Cir.) (en banc), *cert. denied,* 510 U.S. 982 (1993); *United States v. Howard*, 966 F.2d 1362 (10th Cir. 1992).

[71] *United States v. Maserati*, 1 F.3d 330 (5th Cir. 1993).

questions of whether a defendant is a buyer/seller, and whether he is a member of a conspiracy are, in fact, mutually exclusive.[72] And that is because a conspiracy to distribute requires an agreement to further distribute, an element not found in a buyer/seller relationship.[73] Consequently, a large drug buy, especially in cash, doesn't demonstrate that a buyer has "joined" a drug conspiracy any more than a buyer of 100 tons of steel for a high rise has "joined" a steel manufacturer.[74] Quantity only goes to the severity of the sentence, not the presence of a separate criminal agreement.[75] Consequently, Vaught's sizable buys don't prove the existence of a conspiratorial agreement to further distribute, especially in light of Riojas's devil-may-care attitude about his resales.[76]

Conspiracies require a sales pusher.

It might be argued that Vaught's buys over a year period provided sufficient "prolonged cooperation"—the ostensible touchstone of *Direct Sales Co.*[77]—for the existence of a conspiratorial agreement. The argument being that Riojas's "working

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[72] *Id.* at 336.

[73] *Id.* (individual joins a conspiracy when he knowingly participates in a plan to distribute).

[74] *United States v. Baker*, 905 F.2d 1100, 1106 (7th Cir. 1990). *Compare Howard*, 966 F.2d at 1364-65 (large drug buy by person of small financial means provided inference for conspiracy).

[75] *Lechuga*, 994 F.2d at 348. *Compare* 28 U.S.C. § 841 (statutory provisions outline different penalties based on weight).

[76] R 505.13-16.

[77] *Direct Sales Co. v. United States,* 319 U.S. 703 (1943).

in prolonged cooperation" with Vaught, supplying his stock in trade, evolved over time from mere knowledge to the intent to form a conspiracy to further distribute.[78]

But *Direct Sales* is inapposite. Prolonged cooperation is neither the meaning of conspiracy nor an essential element of it.[79] In *Direct Sales*, the defendant was a drug manufacturer and wholesaler that conducted a mail-order business to doctors.[80] In affirming a conspiracy conviction, the Supreme Court concluded that the company didn't just blindly fill the orders for morphine sulfate of a certain small-town doctor, without more, but "joined both mind and hand" to make the doctor's illegal distribution possible.[81] The Court observed:

- Direct Sales, by offering a fifty percent discount on narcotics, "pushed" quantity sales.
- Instead of listing quantities of narcotics like its competitors, it listed them in large units which attracted a disproportionately large group of criminal physicians.
- The company did a work-around with its ordering procedures to enable the small-town doctor to continue his illicit practices.

The court found that the company not only knew of the doctor's illicit use, but that it actively worked to stimulate and promote his operation. The court also noted that it had a stake in the venture—it earned profits that could only come by active

[78] *See* R 225.

[79] *Lechuga*, 994 F.2d at 350.

[80] *Direct Sales*, 319 U.S. at 704.

[81] *Id.* at 713.

encouragement of the doctor's illicit operation—and that stake was also relevant to its final judgment.[82]

Though Riojas sold to Vaught over time, he didn't empower or stimulate Vaught to further distribute his methamphetamine.[83] He didn't change the way he sold to Vaught—didn't give him special deals, prearranged prices, or changed delivery systems—to stimulate his sales or market the meth.[84] Indeed, Riojas's testimony that he didn't care what Vaught did with his buys falls into the carelessness, indifference, and lack of concern that the *Direct Sales* Court said didn't provide the necessary predicate for a conspiratorial agreement. Thus Riojas's knowledge of Vaught's sales—devoid of incitement to further distribute—didn't transmogrify their series of one-off buys into a conspiratorial agreement.[85]

The seized methamphetamine doesn't change the analysis.

Nor does the government's proffer of the seized methamphetamine and Vaught's jailhouse conversations change that analysis. It charged Vaught with just one specific count: conspiracy to possess with intent to distribute 500 grams or

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[82] *Id.*

[83] *Id.* at 711.

[84] *See id.* at 705-707 (Direct Sales "actively stimulated Tate's purchases" by working around the Bureau of Narcotics and reworking its order forms to encourage his illicit operations.).

[85] *See Direct Sales*, 319 U.S. at 712 ("not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy").

more of methamphetamine with five specified individuals.[86] The methamphetamine was seized more than five months after the Riojas organization had been dismantled.[87] And the government's sponsoring witness couldn't connect the methamphetamine to that conspiracy,[88] which could have come from a different dealer.[89] Thus, Vaught's request for Humphries to sell it could have been part of another conspiracy, or maybe a conspiracy on its own.[90] And, lastly, the government didn't offer any evidence of the drug's weight—whether it was 500 grams or more.[91]

Conclusion

In sum, while the government may have arguably proved that Vaught possessed, at one time or another, 500 grams or more of methamphetamine to distribute, it failed to present substantial evidence of a conspiratorial agreement with Eric Riojas or others named in the indictment. The evidence that it did present was, at best, equivocal, giving nearly equal circumstantial support that he was no more

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[86] R 80-81.

[87] R 492.15- 493.10; 493.17-22.

[88] R 531.7-12.

[89] *See* R 87 (government argued that this methamphetamine was intrinsic to the offense) and R 114-15 (the trial court concluded that the acts were intrinsic).

[90] *See* R 80-81 (the government didn't indict any unknowns). *Compare Lennick*, 18 F.3d at 819-20 (government could prove that Lennick has conspired with some other individual (known or unknown)) *and Howard*, 966 F.2d at 1363 (defendant charged with conspiring "with others both known and unknown to the Grand Jury").

[91] See R 532.24 to 534.25.

than just a heavy buyer, not a conspirator. Consequently, his conviction should be reversed.

Dated: 25 May 2010

Respectfully submitted,

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Certificate of Service

I, Peter Smythe, certify that today, 25 May 2010, I served a copy of the brief for Appellant and a copy of the record excerpts in this case upon opposing counsel via email and FedEx, to-wit:

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*/s/ Peter Smythe*____________________
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Dated: 25 May 2010