

Peter Smythe, P.C.

29 November 2010

Mr. Lyle W. Cayce, Clerk
United States Court of Appeals
Fifth Circuit
600 Maestri Place
New Orleans, Louisiana 70130-3408

Re: *United States v. Vaught*
COA No. 10-10110

Dear Mr. Cayce,

Pursuant to Federal Rule of Appellate Procedure 28(j), we alert the panel to new authority bearing on the issue raised on appeal. Oral argument in this case is scheduled for December 7, 2010.

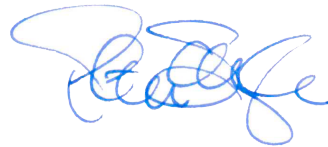
United States v. Rea, 621 F.3d 595; 2010 U.S. App. LEXIS 18380 (7th Cir. 2010). Jose Medina was convicted of conspiracy to distribute methamphetamine and he challenged the sufficiency of the evidence on appeal. Citing *Lechuga*, the Seventh Circuit observed that there is a distinction between a mere buyer-seller relationship and a defendant's participation in a conspiracy. *Id.* at *25. The court held that, in proving conspiracy, the government "must offer evidence establishing an agreement to distribute drugs that is *distinct* from evidence of the agreement to complete the underlying drug deals." *Id.* at *25-26. The court observed the presence of standardized deals and a prolonged buyer-seller relationship, but its decision affirming the conviction turned on the distinct evidence that Medina's supplier, Rea, had fronted methamphetamine to Medina numerous times. *Id.* at *28-29.

United States v. Johnson, 592 F.3d 749 (7th Cir. 2010). In reaching its decision in *Rea*, the Seventh Circuit relied on *Johnson*. A jury convicted Johnson of conspiracy to distribute on the evidence of wiretapped phone calls where Johnson had asked to buy resale quantities of drugs from his supplier. *Id.* at 753. In one call, Johnson told his supplier that he needed drugs because he had a "lick," meaning a customer. *Id.* at 754. Johnson also asked his supplier for a discount; reminded him that he'd continue to do business with him; and enticed him with the prospect of a friend wanting to buy drugs from him. *Id.* at 756.

The court said this evidence was insufficient to support a conspiracy conviction. The court reasoned that while Johnson repeatedly bought methamphetamine in standardized quantities to resell to his own customers and he had a prolonged relationship with his supplier, this kind of evidence also typified a non-conspiratorial wholesale buyer-seller relationship. *Id.* at 757. If the inferences of a conspiracy and a wholesale buyer-seller relationship are equally plausible, the jury has to acquit. *Id.* at 758. The court explained that it's only when the government has offered some distinguishing evidence of a conspiracy, that the jury may rely on standardized quantities and a prolonged relationship to buttress an inference that was an agreement to further distribute the drugs. *Id.* Otherwise, the court said, the law would make any wholesale customer of a conspiracy a co-conspirator *per se.* *Id.* at 755.

In our case, Eric Riojas never fronted any drugs to David Vaught; Vaught always bought his drugs with cash. The government failed to offer any evidence distinguishing Vaught's buys from that of a wholesale buyer. Thus, the judgment should be reversed and conviction vacated.

Respectfully submitted,



Peter Smythe

cc: Mr. Matthew Kacsmaryk via email