IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5125
Conference Panel

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DON OVERTON MALLORY,

Defendant-Appellant.

- - - - - - - - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:91CR57 (03)
- - - - - - - - - - -
(October 29, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:[*]

Don O. Mallory was convicted by guilty plea of using a telephone to facilitate the manufacture, distribution, and dispensing of methamphetamine. He argues that the district court erred in using the capacity of the drug laboratory that he assembled with his co-defendants on his family's rural farm as a basis for establishing his offense level.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

"Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level" as relevant conduct. U.S.S.G. § 2D1.1, comment. (n.12) (Nov. 1991). If the amount of drugs seized does not reflect the scale of the offense, the district court is instructed to "approximate" the quantity of controlled substance involved. § 2D1.4, comment. (n.2). "In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved." Id. (Emphasis added). The district court's determination of the quantity of drugs a laboratory is capable of producing is a fact finding reviewed for clear error. United States v. Smallwood, 920 F.2d 1231, 1236 (5th Cir.), cert. denied, 111 S.Ct. 2870 (1991).

Contrary to Mallory's protestations, his involvement with the drug laboratory was not limited to providing a location to set up the lab. Mallory admitted that he and his co-defendants assembled the laboratory on his family's farm. Mallory provided a water tank, a water pump, filters, electrical outlets, breaker boxes, and a phone for the laboratory. At one point Mallory, his co-defendants, and another individual produced four ounces of methamphetamine and planned a 34-pound "cook."

It is irrelevant that the drug lab was disassembled at the time police officers executed the search warrant. "Neither immediate nor on-going production is required. Instead, this

guideline permits the court to examine the overall scheme and to infer circumstantially either the total drug quantity involved in the offense conduct or the capability of its production." Id. at 1237.

Based upon the chemicals, laboratory equipment, methamphetamine, weapons, ammunition, and cash that was seized, the district court had sufficient evidence upon which to base an estimate of the lab's capacity. The court also had information before it suggesting that the lab had been functioning on the Mallory property: the odor of methamphetamine noted by the officers who stopped his co-defendants' vehicle, and Mallory's and one of his co-defendant's admissions concerning the laboratory and their activities. The court also could consider Mallory's confessions concerning his past drug use. The district court's sentencing determination was not clearly erroneous.

AFFIRMED.