IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-50423

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

J.W. MYERS,

Defendant-Appellant.

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Appeal from the United States District Court for the Western District of Texas

(EP 90 CR 82 6)

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March 28, 1995

Before REAVLEY, GARWOOD and EMILIO M. GARZA, Circuit Judges.[*]

PER CURIAM:

This is the third appeal in this case. *See United States v. Greenwood*, 974 F.2d 1449 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2354 (1993); *United States v. Myers*, No. 93-8027 (5th Cir. Mar. 24, 1994) (unpublished). Myers now appeals his sentence imposed following our 1994 remand for resentencing. He raises three complaints in this appeal. First, he contends that the district

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court should not have attributed to him more than 70 grams of methamphetamine (or mixture containing a detectable amount thereof) out of the total of 1419.5 grams thereof involved in the conspiracy to distribute same of which he was convicted. Myers contends in this respect that our most recent prior opinion in effect held that only the grams involved in the transactions in which Myers was shown to have directly and personally participated, three transactions totaling seventy grams, could be properly attributed to him for sentencing purposes. We disagree. Our prior opinion did not so hold, but rather held only that "the evidence is insufficient to support a finding that the 950 grams of methamphetamine seized from Oliver [March 21, 1990] were reasonably foreseeable to Myers." We did not speak to the remaining some 469.5 grams. On remand, the district court did not attribute to Myers the 950 grams, nor another 112 grams which Oliver delivered to Crain and Greenwood in Louisiana in late November 1989. The district court did attribute to Myers the remaining 357.5 grams.

We also conclude that the record is sufficient to support the district court's finding that the 357.5 grams were reasonably foreseeable to Myers as in furtherance of his jointly undertaken criminal activity, and that such finding by the district court is not clearly erroneous.

We hence reject Myers' first contention.

Myers' second contention on appeal is that the district court erred by failing to award him a downward adjustment for being a minor participant. We reject this contention. The district court's finding that Myers was not a minor participant is not

clearly erroneous on this record.

Myers' third and final contention is that the district court erred in imposing on him the mandatory ten-year minimum sentence prescribed under 21 U.S.C. § 841(b)(1)(A)(viii) because the amount of methamphetamine attributable to him was over one hundred grams. Myers adequately raised this contention at his resentencing. The district court at resentencing concluded that the appropriate guideline sentence, computed without reference to the statutory minimum, provided for a sentencing range of 63 to 78 months. However, the district court found that more than 100 grams of methamphetamine were involved and that accordingly the 10-year minimum sentence provided in the referenced portion of section 841(b)(1) was applicable and therefore sentenced Myers to 120 months' imprisonment, followed by 5 years of supervised release. This portion of section 841(b)(1) provides for a minimum 10-year term of imprisonment for a violation involving "100 grams or more of methamphetamine . . . or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine." We have held, and the government does not dispute, that the "100 grams or more of methamphetamine" in this provision refers only to that quantity of pure methamphetamine. *See, e.g., United States v. Kinder*, 946 F.2d 362 at 367-68 & n.2 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1677 and 2290 (1992).

At the resentencing, the government conceded that it had no evidence to indicate the purity of any of the 1419.5 grams involved in this prosecution. Nor does the government now point us to anything in the record so indicating. The government takes the

position, however, that because more than a kilogram (1,000 grams) of methamphetamine or a mixture or a substance containing a detectable amount thereof was involved in the entire conspiracy of which Myers was convicted, therefore the ten-year minimum sentence was appropriate under the one kilogram or more alternative of the referenced portion of section 841(b)(1), notwithstanding that only 357.5 grams thereof were properly found by the district court to be attributable to Myers for sentencing guidelines purposes.

We have recently rejected this contention and have held "that the standards for determining the quantity of drugs involved in a conspiracy for guideline sentencing purposes apply in determining whether to impose the statutory minimums prescribed in § 841(b)." *United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1995). Thus, we reject the government's contrary contention.

The government alternatively contends that we should assume that the 357.5 grams had a sufficient purity percentage to amount to 100 grams of pure methamphetamine. However, the government points to nothing in the record which suggests that such an assumption would be appropriate, and the record is entirely silent in that respect. We at least inferentially rejected such a contention in *Kinder*, 946 F.2d at 368.

Accordingly, albeit reluctantly, we again remand this case for resentencing. On remand, the district court should allow the government to present evidence from which it might be reasonably inferred that the 357.5 grams had a sufficient percentage of purity so as to contain at least 100 grams of pure methamphetamine. If a sufficient showing in that respect is made, the district court may

reimpose the same sentence on Myers. Otherwise, the district court must resentence Myers without reference to the above-mentioned statutory minimum of section 841(b)(1).

SENTENCE VACATED; CAUSE REMANDED FOR RESENTENCING