

APPENDIX

APPENDIX A

United States v. Pasillas, 713 Fed.Appx. 311 (5th Cir. Feb. 22, 2018) (unpublished).....	1a
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APPENDIX B

District Court Judgment: United States v. Pasillas; No. 4:16-CR-00122-O(20) (NDTX, December 12, 2016).....	3a
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APPENDIX C

Excerpt from Sentencing Transcript (December 12, 2016)	7a
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713 Fed.Appx. 311

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee

v.

Juan PASILLAS, Defendant-Appellant

No. 16-11770

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Summary Calendar

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Filed February 22, 2018

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:16-CR-122-20

Attorneys and Law Firms

James Wesley Hendrix, Assistant U.S. Attorney, [Brian W. Portugal](#), Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX, for Plaintiff-Appellee

[Nelson Ebaugh](#), Esq., Houston, TX, for Defendant-Appellant

Before [WIENER](#), [DENNIS](#), and [SOUTHWICK](#), Circuit Judges.

Opinion

PER CURIAM: *

A jury convicted Juan Pasillas of conspiracy to possess with intent to distribute 500 grams or more of methamphetamine, in violation of [21 U.S.C. § 846](#) and [21 U.S.C. § 841\(a\)\(1\), \(b\)\(1\)\(A\)](#). The court sentenced Pasillas to 360 months of imprisonment and five years of supervised release, and Pasillas filed a timely notice of appeal.

Pasillas argues that (1) the evidence was insufficient to convict him of conspiracy to possess methamphetamine with intent to distribute, (2) this court should reverse and

remand for a new trial because significant and substantial portions of the record are missing, and (3) the district court erred by imposing a two-level enhancement for possession of imported methamphetamine.

This court reviews a challenge to sufficiency of the evidence de novo. [United States v. Chon](#), 713 F.3d 812, 818 (5th Cir. 2013). This review is “highly deferential to the verdict.” *Id.* (citations omitted). “[V]iewing the evidence in the light most favorable to the prosecution,” we consider whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (citations omitted). To prove a criminal conspiracy, the Government has the burden of proving beyond a reasonable doubt that (1) an agreement to violate the law existed and (2) each conspirator knew of, intended to join, and voluntarily participated in the conspiracy. *Id.*; see [United States v. Maseratti](#), 1 F.3d 330, 336, 337 (5th Cir. 1993). Though a mere buyer-seller relationship does not alone demonstrate that one is a co-conspirator, evidence of buying and selling activity is probative of whether a defendant intended to join the conspiracy by redistributing the illegal substance. See [Maseratti](#), 1 F.3d at 336. Here, presented with evidence of the quantity and frequency of Pasillas methamphetamine purchases and expert testimony that Pasillas’s wire-tapped phone calls with his supplier demonstrated his intention to distribute this *312 methamphetamine to other customers, a rational trier of fact could have determined that Pasillas knew of, intended to join, and voluntarily participated in an agreement to possess and distribute methamphetamine. See *id.*

Second, Pasillas argues that this court should reverse and remand for a new trial because the court reporter’s record is incomplete. Under the Court Reporter Act (CRA), a court reporter “shall ... record[] verbatim ... all proceedings in criminal cases had in open court.” [28 U.S.C. § 753\(b\)](#). When “a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record ... is sufficient to mandate reversal.” [United States v. Selva](#), 559 F.2d 1303, 1306 (5th Cir. 1977). Here, however, the omitted material is not substantial or significant, but rather “administrative in nature.” [United States v. Gieger](#), 190 F.3d 661, 667 (5th Cir. 1999). Therefore, a reversal is not warranted because the record is “merely technically incomplete.” [Selva](#), 559 F.2d at 1306 n.5.

Third, Pasillas argues that an enhancement under U.S.S.G. § 2D1.1(b)(5) is not warranted without the offender's knowledge that the distributed methamphetamine was imported. However, he acknowledges that this issue is foreclosed by *United States v. Foulks*, 747 F.3d 914 (5th Cir. 2014). Therefore, the

district court did not err by applying the enhancement. *See id.* at 915.

Pasillas's conviction and sentence are AFFIRMED.

All Citations

713 Fed.Appx. 311

Footnotes

- * Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

JUAN PASILLAS

Case Number: 4:16-CR-00122-O(20)
U.S. Marshal's No.: 54183-177
Shawn Smith, Assistant U.S. Attorney
Gary D. Smart, Attorney for the Defendant

On August 31, 2016 the defendant, JUAN PASILLAS, was found guilty by jury verdict as to Count One of the Third Superseding Indictment filed on August 10, 2016. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 846	Conspiracy to Possess with Intent to Distribute a Controlled Substance	April 27, 2016	One

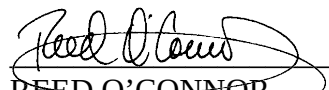
The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Third Superseding Indictment filed on August 10, 2016.

Upon Motion of the Government, all remaining Counts are dismissed, as to this defendant only.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed December 12, 2016.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed December 14, 2016.

IMPRISONMENT

The defendant, JUAN PASILLAS, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Three Hundred Sixty (360) months** as to Count One of the Third Superseding Indictment filed on August 10, 2016. This sentence shall run concurrently to any future parole revocation under Case No. 1253288D, in the 372nd District Court of Tarrant County, Texas.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Five (5) years** as to Count One of the Third Superseding Indictment filed on August 10, 2016.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

- (1) not leave the judicial district without the permission of the Court or probation officer;
- (2) report to the probation officer as directed by the Court or probation officer and submit a truthful and complete written report within the first five (5) days of each month;
- (3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) support the defendant's dependents and meet other family responsibilities;
- (5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;
- (7) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- (8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- (9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;
- (11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
- (12) not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and,
- (13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the U.S. probation officer;

report in person to the U.S. Probation Office in the district to which the defendant is released from the custody of the Federal Bureau of Prisons within 72 hours of release;

refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill; and,

participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY
Deputy Marshal

1 (December 12, 2016.)

2 THE COURT: This is case number 4:16-CR-122, the
3 United States versus Juan Pasillas. Mr. Smith is here.
4 Mr. Smart is here. Sir, would you state your full name for
5 the record.

6 THE DEFENDANT: Juan Manuel Pasillas.

7 THE COURT: All right. Thank you, sir. We are here
8 for purposes of your sentencing. Counsel, did you and your
9 client receive in a timely manner a copy of the Presentence
10 Investigation Report and the Addendum.

11 MR. SMART: We did.

12 THE COURT: And have you reviewed those documents
13 with your client?

14 MR. SMART: Yes. And he received copies also.

15 THE COURT: All right. Thank you. So, did the
16 Government receive this is?

17 MR. SMITH: Yes, Your Honor.

18 THE COURT: And now, there have been three objections
19 filed. The first one goes to the threat. The second one
20 deals with the importation enhancement. The third one deals
21 with the reckless endangerment enhancement.

22 Do you wish to present any evidence on these
23 objections?

24 MR. SMART: Judge, with regard to Mr. Lee's
25 credibility, the Government filed an attachment to their

1 Response and I would direct the Court to a report dated
2 5-18-16, on page 2 of 4, where Lee denied telling
3 investigators in 2016 that he'd been getting 4 ounces of
4 methamphetamine from Pasillas almost daily since Hector
5 Valdez's arrest. I think that goes to Mr. Lee's credibility
6 in the case where he's obviously contradicted himself to case
7 agents which never was mentioned by the probation officer or
8 was never disclosed by the Government. I think that's *Brady*
9 material also, Judge. It was never disclosed by the
10 Government. But all that aside, I think --

11 MR. SMITH: Your Honor, I'm going to stop right there
12 on that point or interject on that point. This material was
13 disclosed in discovery; Mr. Lee's statement. I don't know
14 what Mr. Smart is saying right now, but it's always been a
15 part of the discovery.

16 MR. SMART: Well, just lumping -- I got about, I
17 don't know, three or four thousand pages of material and for
18 him to say, Well, it's all in the material, Judge, that --
19 that doesn't satisfy *Brady*. He knows that.

20 MR. SMITH: That's a complete mischaracterization of
21 what -- of the state of the evidence, of the record of the --
22 of the -- of what we did in this case for Mr. Smart and the
23 defendant. And I would -- and furthermore, it's right here in
24 a public filing in court. He says it's *Brady* material that is
25 or a *Brady* violation occurred, that's ridiculous.

1 **THE COURT:** Okay. Anything else on the objections?

2 **MR. SMART:** No. I'll make some arguments with regard
3 to them but I don't have anything in additional evidence. My
4 objections basically state my reasons for questioning his
5 credibility. Also, the fact that he -- he's never -- was
6 never called as a witness in the case by the Government but
7 they relied on a lot of these statements both in the PSR and
8 in the trial to exacerbate Mr. Pasillas's sentence, both with
9 regard to this credible threat or supposed credible threat of
10 violence and the evading arrest charge itself.

11 **THE COURT:** Anything else?

12 **MR. SMART:** No, sir.

13 **THE COURT:** Any response?

14 **MR. SMITH:** Just briefly, Your Honor. Nothing more
15 on the discovery issue. But just as Mr. Lee -- the Government
16 need to use at trial because we had the defendant because
17 there is no need to call Mr. Lee about stating we have on the
18 Court for the trial. Furthermore, as it relates to this --
19 this objection, endangerment, threat, Mr. Lee was consistent
20 in both his post-arrest the proffer attached for the Court.

21 **THE COURT:** Okay. Very good. I will overrule these
22 objections for the reasons stated in the Addendum and in the
23 Government's Response.

24 I will adopt the fact findings in all of these
25 documents. I will adopt the probation officer's conclusions