

TARA J. ELLIOTT
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
105 E. Pine, 2nd Floor
Missoula, MT 59802
Phone: (406) 542-8851
FAX: (406) 542-1476
Email: Tara.Elliott@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON WASHINGTON, Defendant.	CR 11-61-M-DLC <u>UNITED STATES'</u> <u>SENTENCING MEMORANDUM</u>
--	--

Plaintiff, United States of America, by and through its counsel of record, Tara J. Elliott, Assistant U.S. Attorney for the District of Montana, hereby files this sentencing memorandum based on the Ninth Circuit's limited remand of June 25, 2014 which directed the Court to "reconsider its analysis, taking into account

Washington's 'control over others involved in the commission of the offense' and his responsibility 'for organizing others for the purpose of carrying out the crime.'" Doc. 611 at 4 (citation omitted).

The United States recommends Washington be sentenced to serve 60 months incarceration. Sentencing in this matter is set for October 15, 2014, at 3:30 p.m.

ARGUMENT

Washington is Not Eligible for Relief Under U.S.S.G. § 5C1.2.

Under certain limited circumstances, a defendant can avail himself of the "Safety Valve" found in U.S.S.G. § 5C1.2 to get out from under the mandatory minimum punishment set by statute. Washington does not qualify. The safety valve criteria are:

- (a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below:
 - (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);
 - (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

- (3) the offense did not result in death or serious bodily injury to any person;
 - (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
 - (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.
- (b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.

Washington is not eligible for the safety valve because of subsection (a)(4) as detailed more fully below. Because Washington has not met the criteria, he faces a mandatory minimum sentence of 60 months incarceration.

Washington has previously argued that he did not supervise and manage other individuals and thus, he should not receive a three-level enhancement for his aggravating role in the offense under U.S.S.G. § 3B1.1(b). Washington previously cited *United States v. Lynch*, 2010 WL 1848209 (C.D. Cal. 2010) for

this precedent. This argument is without merit.

Washington organized, owned, and operated an industrial marijuana-grow with more than 1,000 plants and two dispensaries in Western Montana. He employed numerous people to help with his business. Chris Cronshaw was the main cultivator of the marijuana at the “Wye” facility; Gregory Zuckert was a consultant for the “Wye”; Lisa Fleming¹ was his accountant; Jenny Wagoner was a former employee who helped in numerous ways; Dee Dee Alvarado made baked goods containing marijuana at Washington’s direction and ran the Hamilton BSH dispensary; Brad Bjorkland was an employee who Washington instructed to do various things; and Washington directed the “trimmers” who worked at the “Wye.” PSR ¶ 27, 31-32, 33, 34, 43, 47.

Washington received all of the proceeds of the crimes. Washington paid co-conspirator Sann approximately 300k in cash for the “Wye” grow and all estimates indicate that Washington was receiving profits of 10k per month from the Hamilton store and 80k per month from the Missoula store. PSR ¶ 31.

The aggravating role enhancement, also known as the leader/organizer enhancement, provides:

¹ Fleming also took trips with Washington to purchase marijuana. She laundered proceeds of the marijuana business for both Washington and Brent Russom (co-owner of BSH) by taking their cash and depositing it into her account and then paying their credit card bills. PSR ¶ 52.

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Relying on *Lynch*, Washington has argued that this court should ignore his role in the offense and focus on policy reasons and facts that have nothing to do with the supervisory role that governs the enhancement's application. On appeal, however, the Ninth Circuit has directed the Court to "apply the enhancement according to its plain terms, without regard to departures." Doc. 611 at 3.

Washington grew and sold marijuana solely to make a profit. He was not running his business in accord with state law, and he directed numerous other

individuals in his employ. Washington took orders from no one, but rather numerous people took orders from him; thus, Washington is the leader and organizer, or at the very least, the manager of this marijuana operation.

a. Washington controlled and directed others.

The aggravating role enhancement is appropriate where “the defendant exercised some control over others involved in the commission of the offense or was responsible for organizing others for the purpose of carrying out the crime.”

United States v. Yi, 704 F. 3d 800, 807. Both occurred here.

In fact, all of the factors in the guideline commentary advocating for the enhancement’s application appear in this case:

Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1, comment. (n.4).

It is undisputed that Washington exercised decision-making authority for the enterprise. He was owner, operator, and sole shareholder of the business. Those same facts establish that the nature of his participation in the offense was that of a leader/organizer/ supervisor/manager. He then exercised control over them as

their employer, supervisor, and manager. Washington and Brent Russom were the original founders of Big Sky Health, but by the time of the wiretap, Washington was the sole owner.

Even the nature and scope of the illegal activity weigh in favor of the enhancement. As the background commentary explains, the enhancement “should increase with both the size of the organization and the degree of the defendant’s culpability.” U.S.S.G. § 3B1.1, comment. (backg’d). With “relatively small criminal enterprises” that are not “extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility.” *Id.* These delineations are “reflected in the inclusiveness of § 3B1.1(c).” *Id.* The nature and scope of Washington’s enterprise could have led the PSR writer to recommend the four-level enhancement of § 3B1.1(a), rather than the three-level enhancement of § 3B1.1(b). PSR ¶ 67.

The *Lynch* court looked to the commentary that says, “To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants.” *Lynch*, 2010 WL 1848209 at *18 (citing USSG § 3B1.1 comment (n.2.)). It read this language to

mean that being a leader/organizer “simply qualifies” the defendant for the enhancement, but does not require the enhancement. *Id.* It then used the background commentary to add an additional requirement for the enhancement’s application: that the defendant present a danger to the public or a danger to recidivate. *Id.* That ruling ignores the *mandatory* language of the enhancement’s text, i.e. “If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, *increase* by 3 levels.” U.S.S.G. § 3B1.1(b) (emphasis added).

By denying the aggravated role enhancement on factors unrelated to Lynch’s role in the crime, the district court improperly used policy considerations to “create [] an exception to one of five [safety valve] criteria established by Congress and the President’ by ‘judicial fiat.’” *United States v. Yepez*, 704 F.3d 1087, 1091 (9th Cir. 2012) (en banc) (citation omitted) (rejecting attempt to evade safety valve requirements by nunc pro tunc altering of whether defendant was on probation at time of offense). In doing so, the guideline’s plain text was ignored and Lynch received an unjust sentence.

b. Washington acknowledged his leadership role by word and by deed.

Washington was brazen about his drug dealing. In call # 1708²,

Washington told his brother that the drug business is “high stakes, high pressure, high risk, high reward. It is what it is brother . . . we’ll see who’s standing at the end of the fight.” In call # 7940, Washington told Lisa Fleming that “if it didn’t take no balls to be in the game, everyone would be doing it.” In call # 7976, Washington told his brother Terrence Taylor, “that shit [marijuana business] is a mother fucking goldmine.” Washington’s business wasn’t about the patients and serving the ill, it was about making money and serving himself. In Call # 4611, Washington complains that he has to drive five hours to “re-up for these faggot ass patients.” Those statements are important because they demonstrate Washington’s control over his enterprise and his keen understanding of the potential perils that accompanied running a large illegal organization.

His actions, which consistently involved violations of Montana law, also provide evidence of management and supervision. In call # 7162, Washington told his employee Brad Bjorkland to “throw [the marijuana] in the trunk” because Brad doesn’t have his card. In call # 7623, Washington told Bjorkland that he will tell law enforcement that Bjorkland was doing “volunteer work” to avoid state law enforcement requirements.

Washington employed “trimmers” at the “Wye” grow operation who did not

² All “calls” are references to Government’s Trial Exhibit 1 and indicate the specific call numbers contained on said exhibit.

have medical marijuana cards. Washington and Cronshaw discussed telling law enforcement that these trimmers were not touching the plants in an attempt to avoid running afoul of state regulations. *See* Call # 7285.

Washington was supplied marijuana from California from Jesse Shewalter who was not a caregiver under Montana state law. Washington gave him marijuana for his services. *See* Call # 4902.

Washington received marijuana from Shawn Helvick who also was not a caregiver under Montana state law. On October 23, 2011, Washington picked up marijuana from Helvick in the dark of night behind a Conoco station in Missoula, Montana.

Jenny Wagoner gave marijuana plants to Washington when she left for Arizona. This was illegal under Montana state law.

Washington repeatedly kept marijuana at his business 406 Motoring. This was illegal under Montana state law.

Washington repeatedly spoke about “selling patients” to others to keep his numbers down and to thwart law enforcement. *See* Call #s 8338, 4407, 8122.

In call # 742, Washington and Darin Mower, who routinely supplied Washington with bulk marijuana, discussed trading a stereo head unit for marijuana.

Washington was not in compliance with state law and he was well aware that his conduct was illegal federally. His knowledge and non-compliance serve to highlight his role in the offense. He appreciated the risks associated with being in charge, as evidenced by his conversations with his brother and others. The conduct described above is relevant under 18 U.S.C. § 3553(a), but it is also important in resolving the issues surrounding application of the leadership enhancement. Washington acknowledged in word and in deed that he was in control of his marijuana business and he understood the risks associated with assuming a leadership role. He cannot now claim to have been simply another co-conspirator – the evidence does not support that conclusion. His role in the offense justifies an enhancement under U.S.S.G. § 3B1.1 and, consequently, Washington does not qualify for safety valve relief under U.S.S.G. § 5C1.2(a)(4).

SENTENCE RECOMMENDATION

Jason Washington is a drug dealer who sold pounds and pounds of marijuana and profited hundreds of thousands of dollars from an organized and illegal enterprise. The government nevertheless recognizes that a downward departure³ and a downward variance continue to be appropriate and recommends a sentence of 60 months.

³ See Docs. 572, 573.

The government feels that this recommendation is substantively reasonable under 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220, 261 (2005). Specifically, this disposition will ensure that the resolution of this matter is consistent with the sentences meted out to defendants in similar cases that have been decided by this Court and other courts within the District of Montana.

Thus, the recommended sentence in this matter is of a unitary nature, designed to achieve the imposition of a substantively reasonable sentence. Such a unitary recommendation is appropriate in the post-Booker sentencing regime. *See, e.g., United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006) (noting that any post-Booker decision to sentence outside the United States Sentencing Guidelines is subject to a unitary review for reasonableness).

DATED this 29th day of September, 2014.

MICHAEL W. COTTER
United States Attorney

/s/ Tara J. Elliott
Assistant United States Attorney
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to D. Mont. L.R. 7.1(d)(2) and CR 47.2, the attached sentencing memorandum is proportionately spaced, has a typeface of 14 points or more, and the body contains 2318 words.

/s/ Tara J. Elliott

Assistant United States Attorney
Attorney for Plaintiff