

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. XXXXXXXXXXXX
	)	
DDDDDDDDDD,	)	
	)	
Defendant.	)	

**DEFENDANT’S SENTENCING MEMORANDUM**

COMES NOW the Defendant, through counsel, Stephen C. Moss, Assistant Federal Public Defender for the XXXXXX, and moves this Court to impose a five year term of imprisonment at his sentencing scheduled for XXXXXXXX, 2005. A sentence at the statutory minimum is warranted for two reasons. First, a five year sentence is appropriate based on the sentencing factors at 18 U.S.C. § 3553. Second, a five year sentence avoids any ex post facto concerns that are raised by the Court’s revision of the guidelines in Booker.

**SUGGESTIONS IN SUPPORT**

On December 15, 2004, Mr. D pled guilty to conspiracy and attempted manufacture of methamphetamine, both Class B felonies that carry a minimum five-year prison sentence. The offense conduct alleged in the indictment occurred between January 1, 2003, and March 31, 2004. Based on an offense level of 25 and criminal history category of V, the presentence investigation report [herein “PSI”] concludes that Mr. D’s guideline range is 100 to 125 month. The offense calculation included relevant conduct that occurred subsequent to the March 31, 2004 date noted in the indictment. Notwithstanding this advisory range, Mr.

D submits that a sentence of sixty months incarceration is appropriate based on the criteria of sentencing factors of 18 U.S.C. 3553(a) and ex post facto issues raised by Booker.

**A. In light of Booker the court must now consider the factors enumerated at 18 U.S.C. § 3553(a) as the controlling framework for sentencing.**

Booker held that the guidelines were no longer mandatory, and that sentencing courts must now consider all the factors set forth in 18 U.S.C. § 3553(a). 125 S. Ct. 738 (2005). Section 3553(a) is composed of two distinct parts: the sentencing mandate contained in the prefatory clause of 3553(a) and the enumerated factors at 3553(a)(1-7). The overriding principle of 3553(a) that guides the court’s evaluation of an appropriate sentence is a limiting one: the court must impose a sentence that is “sufficient, but not greater than necessary” to satisfy the statutory goals of sentencing. Id. The factors include the 1) “nature and circumstances of the offense, and the history and characteristics” of Mr. D, 2) the need for the sentence to reflect the severity of the offense, deterrence, to protect the public, and to provide Mr. D with educational, vocational, and correctional treatment in the most effective manner, (A-D), 3) the kinds of sentences available, 4) the sentencing guideline range, 5) the sentencing policy statements, 6) the need to avoid unwarranted sentence disparity, and 7) the need to provide restitution. Id.

**1) The Nature and Circumstances of the Offense, and History and Circumstances of D.**

The nature of the offense in this case is similar to other methamphetamine cases. The

report demonstrates that Mr. D engaged in a pattern of destructive behavior that continued unabated until his arrest and detention (PSI at X). Though the indictment also contains charges that relate to a counterfeiting ring, Mr. D had no involvement with that activity. Mr. D's involvement was directly related to his methamphetamine addiction. Significantly, the majority of Mr. D's involvement with the manufacture of methamphetamine occurred primarily to support his addiction. See PSI at X, ¶ 19 (statement of codefendant XXX that D did not cook anything over 5 grams, and most cooks were for personal use); PSI at X, ¶ 23 (statement of D that he had used a half a gram of methamphetamine daily for the last 7 years, but had only cooked for the last year).

The report demonstrates that Mr. D had a difficult childhood, which included the loss of his father due to suicide and an alcoholic mother (PSI at X, ¶ 77). Though he has never participated in mental health counseling, Mr. D is presently prescribed medication to deal with depression and anxiety related to the instant proceedings (PSI at 23). Substance abuse is frequently related to other mental health problems. In addition to methamphetamine, Mr. D's substance abuse history includes alcohol, marijuana, cocaine, LSD, and mushrooms (PSI at 23, ¶ 84). Based on these circumstances, Mr. D presents as an ideal candidate for both drug and mental health treatment.

Though Mr. D has a significant criminal record, all but two of his criminal history points stem from his substance abuse problems. Mr. D received three points for a 1995 conviction for possession of a controlled substance (PSI at X, ¶ 60). Mr. D received two points for a 1999 conviction for driving while intoxicated (PSI at X, ¶ 62). Mr. D received

one point for a 2003 paraphernalia conviction based on his possession of a glass smoking pipe with methamphetamine residue, and an additional two points because a portion of the offense conduct occurred after probation was granted on November 5, 2003 (PSI at X, ¶¶ 67, 69). The only criminal history points that do not involve substance abuse derive from a 1998 misdemeanor bad check conviction that ran concurrently with his driving while intoxicated conviction (PSI at X, ¶ 63).

**2) The need for the sentence to reflect respect for the law, adequate deterrence, to protect the public and the need for educational or correctional treatment in the most effective manner.**

A five year sentence of imprisonment for a person that has accepted responsibility by pleading guilty is by no means a lenient sentence. Mr. D did not profit from the offense in a monetary sense or otherwise; he simply satisfied an addiction. Given that this offense stemmed from a condition, rather than an effort to make money through the manufacture and distribution of methamphetamine, a five year sentence is sufficient to promote respect for the law and to deter the sort of conduct at issue in this case. Though the manufacture of methamphetamine is dangerous, the offense conduct in this case did not constitute a deliberate and intentional effort to harm the public. Addressing the source - Mr. D's meth addiction - of what has driven this conduct through treatment is the most effective way to protect the safety of the public.

As noted in the report, Mr. D acknowledges his drug problem and is committed to obtaining drug treatment to conquer this addiction (PSI at X, ¶ 85). Based on the nature of the offense and his expressed desire for treatment, Mr. D is an obvious candidate for the 500

hour residential drug treatment program offered by the Bureau of Prisons.

**3) The kinds of sentences available.**

Because Mr. D has been convicted of a Class B felony, no sentence other than imprisonment is authorized (PSI at 26, ¶ 104). Though imprisonment is the only sentencing option in this case, the court is required to recognize that “imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C. § 3582(a). This recognition is consistent with the sentencing principle noted in Section 3553(a) that the court should impose a sentence no “greater than necessary” to satisfy the statutory goals of sentencing.

**4-5) The advisory sentencing guideline range, and the sentencing policy statements.**

As calculated, the sentencing guidelines establish an applicable range between 100 and 125 months. The offense level in this case is driven entirely by an estimate of drug quantity. Because the calculation of drug quantity as a measure of culpability is extremely arbitrary, Mr. D submits that this advisory range does not promote the statutory goals of sentencing. The arbitrary and capricious nature of this measure is demonstrated in several ways.

First, the measure of drug quantity does not distinguish between methamphetamine that is distributed to others and methamphetamine that is intended and consumed for personal use. Such a distinction is highly relevant to evaluating Mr. D’s culpability. Drug quantity as a measure of culpability does not accurately gauge the degree of harm inflicted on society

by this offense because the vast majority of drug quantity that was manufactured was used by Mr. D, rather than distributed to other persons.

Second, the drug quantity calculation in this case was influenced to a large extent by the timing of the federal prosecution, and the concomitant lack of any state prosecution. For example, the measure of drug quantity in this case is based on law enforcement drug seizures on June 13, 2003, June 19, 2003, December 12, 2003, and September 13, 2004. Had the prosecution been instituted in June 2003, either by state or federal authorities, Mr. D might only be facing several years of incarceration, rather than a minimum sentence of five years. While the prosecutorial action delay of more than one year may have furthered law enforcement's investigation into the scope of the conspiracy, it did so at the expense of Mr. D. Given the extremely addictive nature of methamphetamine, it is almost always the case that addicts will keep using and cooking until they are incarcerated.

Mr. D further submits that the advisory guideline range should carry little weight in the overall sentencing calculus. The guidelines as a whole do not to promote the statutory goals of sentencing, and in fact explicitly disregard many factors that are specifically identified by 18 U.S.C. § 3553(a). The sentencing guidelines have evolved into a skewed system that unduly emphasizes the need for deterrence and retribution while rejecting consideration of the individual circumstances of each defendant and each offense. For example, the guidelines provide that most individual circumstances are usually not even relevant at sentencing. See USSG §§ 5H1.1 (age), 5H1.2 (education and vocational skills), 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition, including drug or

alcohol dependence), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), 5H1.11 (record of military, civic, charitable, or public service), 5H1.12 (lack of guidance as a youth).

This myopic focus on the punitive goals of sentencing is demonstrated by how the guidelines address departures. The offense guidelines in Chapter Two are chock-full of suggestions for upward departure, yet contain very few bases for downward departure. No less than forty-nine offense guidelines contain suggestions for upward departure in their commentary. See USSG §§ 2A2.1, A2.4, A3.1, A3.2, A6.1, B1.1, B1.5, B2.1, B3.1, B.3.2, B5.3, C1.1, C1.8, D1.1, G1.1, G1.3, G2.1, G2.2, H4.1, J1.1, J1.3, J1.6, K1.3, K1.4, K2.1, K2.4, K2.5, L1.1, L2.1, L2.2, M3.1, M4.1, M5.1, M5.2, M5.3, N1.1, N1.2, N1.3, N2.1, P1.1, P1.3, Q1.1, Q1.2, Q1.3, Q1.4, Q2.1, R1.1, T1.8, and T2.1. Many of these guidelines contain multiple bases for upward departure, such as Sections B1.1 (nine) and K1.3(five). Of these forty-nine, only five guidelines contain suggestions for downward departure. See USSG §§ 2B1.1, 2M3.1, 2N1.1, Q1.3, and Q1.4.

This one-sided focus on factors that increase the length of prison terms is also evident by how the guidelines treat departures generally. USSG §§ 5K2.0 through 5K2.13 contains thirteen bases for upward departure, but only seven for downward departure. Though the statistical disparity between recognized bases for upward and downward departure is less severe here, an examination of each guideline shows that the discretion afforded the court for downward departure is limited and usually confined to a specific criteria, whereas the discretion granted for upward departure is essentially unconstrained. Compare USSG §§

5K2.10, 2.13, and 2.20 with 5K2.4, 2.5, 2.6, 2.8, 2.9.

Because the overall punitive nature of the guideline system is plainly inconsistent with the sentencing mandate and factors articulated by 18 U.S.C. § 3553, this Court should treat the advisory guideline range as only one of seven factors to consider in the sentencing process. See United States v. Franklin, 397 F.3d 604, 607 (8<sup>th</sup> Cir. 2005) (Chapter Seven revocation ranges are merely advisory and record must show court’s awareness of sentencing factors in imposing a revocation sentence but court need not “mechanically list every § 3553(a) consideration”).

**6) The need to avoid unwarranted sentence disparity.**

A five year period of incarceration in this case would not create unwarranted sentencing disparity. The applicability of the five year mandatory minimum term of imprisonment to this case already acts a sufficient check on sentencing disparity by applying to all defendants that are convicted of this offense and are ineligible for the safety valve.

**B. Because Mr. D’s conduct occurred prior to January 12, 2005, the Ex Post Facto and Due Process Clauses limit the manner in which the Booker revision of the sentencing guidelines applies in this case.<sup>1</sup>**

The limitations on ex post facto judicial decision-making are inherent in the notion of due process. Rogers v. Tennessee, 532 U.S. 451, 456 (2001). This prohibition applies both to legislative and judicial branches. Id. at 353-54. The Due Process Clause imposes a limitation on ex post facto judicial construction because it contains the basic principle of “fair

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<sup>1</sup>Mr. D submits this argument in the alternative should the court find that a sentence of more than seventy months is warranted by consideration of the factors of 18 U.S.C. § 3553.

warning.” Id. at 457. Moreover, the remedial portion of Booker essentially functions as a legislative change because the Court inferred a specific savings provision from the guidelines that allowed it to excise certain provisions. This savings clause took effect on the date Booker held the guidelines unconstitutional.

Due process and ex post facto issues are implicated in this case because the remedial portion of Booker eliminated the mandatory nature of the sentencing guidelines. Prior to Booker the “statutory maximum” under the mandatory guidelines was the top number of the applicable range. 125 S. Ct. At 749 (quoting Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004)). Because Booker’s revision of the guidelines expanded the penalty that a court could impose, its remedial portion cannot be applied retroactively to Mr. D’s detriment without violating the Ex Post Facto Clause. See United States v. Bell, 991 F.2d 1445, 1448-52 (8<sup>th</sup> Cir. 1993) (guideline amendments that raise applicable range cannot be applied retroactively under Ex Post Facto Clause).

Mr. D is also entitled, however, to be sentenced in accord with the Sixth Amendment, which requires that a sentence under mandatory guidelines must be based on facts found by the jury or admitted by him. Under this approach Mr. D is entitled to the benefit of the Sixth Amendment holding of Booker, but cannot be disadvantaged by its remedial portion. The Supreme Court approved the propriety of this approach in Marks v. United States, 430 U.S. 193 (1977). In Marks the Court held that standards for obscenity that expanded criminal liability could not be applied retroactively whereas standards that benefitted a defendant would apply. 430 U.S. at 196 (citing Miller v. California, 413 U.S. 15 (1973) and Hamling

v. United States, 418 U.S. 87, 102 (1974)).

Mr. D admitted during his guilty plea that his offense involved a mixture or substance containing methamphetamine that was greater than 50 grams, which provides an offense level of 26. This admission was consistent with the language of the indictment and lab reports that were prepared in the case. Mr. D also disputes that his paraphernalia conviction noted at ¶¶ 67 and 69 of the presentence report was separate from the offense conduct, which would reduce his criminal history category from V to IV. Based on an offense level of 23 and criminal history category of IV, Mr. D's applicable range under a Blakelyized version of the guidelines is 70 to 87 months.

WHEREFORE, the Defendant, respectfully requests this Court to impose a sentence of sixty months of imprisonment in this case.

Respectfully submitted,

/s/ STEPHEN C. MOSS