

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	CASE NO. 8:08CR388
	)	
Plaintiff,	)	
	)	
v.	)	<b>BRIEF IN SUPPORT OF MOTION TO DISMISS INDICTMENT</b>
	)	
DEJAY MONSON,	)	
	)	
Defendant.	)	

The Defendant, Dejay Monson, through undersigned counsel, submits the following brief in support of his motion to dismiss the Indictment.

**FACTS**

The following facts are contained in investigative reports received from the government through discovery. On September 16, 2008, officers of the Burt County Sheriff's Office executed a search warrant at the Dejay Monson residence in Craig, Nebraska. Inside Monson's residence, officers allegedly discovered 67 pounds of processed marijuana. The officers also claim to have found 266 marijuana plants on the property (35 in the basement and 231 in outside fields), though none of the plants were tested before they were cut down and burned by the officers. This denied Monson the means to prove that officers had cut down feral hemp (aka "ditch weed") and added it to the tally of marijuana plants they accused Monson of cultivating.

On October 22, 2008, an indictment was filed in the United States District Court for the District of Nebraska charging Monson with manufacturing 100 kilograms or more of marijuana, in violation of 21 U.S.C. § 841(a)(1), and possession with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1). The relevant statute allows the government to alternatively prove that the defendant

manufactured and/or possessed with intent to distribute 100 or more marijuana plants regardless of weight. The 100 kilogram\100 plant quantity is an element of the offense and is tied to a five year mandatory minimum sentence. The indictment must be dismissed because the government has violated Monson's due process rights by depriving him of access to potentially exculpatory evidence. Without that evidence, the government cannot prove that Monson manufactured or possessed 100 kilograms\100 plants or more of marijuana. More importantly, Monson is unable to properly defend himself against the 100 kilogram\100 plant allegation because he cannot have the seized plants inspected and tested to determine whether they were cultivated marijuana or "ditch weed."

### **ARGUMENT**

Where the defendant does not have a prior felony drug conviction, and no death or serious bodily injury has resulted from use of the substance, the statute sets a maximum sentence of 20 years. In order to subject Monson to the increased statutory maximum sentence of 40 years, as proscribed in 21 U.S.C. § 841(b)(1)(B), the government must prove beyond a reasonable doubt that Monson manufactured or possessed with intent to distribute 100 kilograms\100 plants or more of marijuana. Apprendi v. New Jersey, 530 U.S. 466 (2000). The government cannot prove such a quantity in this case without violating Monson's due process rights. Therefore, the indictment must be dismissed.

In California v. Trombetta, 467 U.S. 479, 488 (1982), the Supreme Court established the framework for determining whether the destruction of evidence deprives a defendant of due process. The Court found that the Constitution imposes a duty upon the government to preserve "evidence that might be expected to play a significant role in the suspect's defense." To be constitutionally material, however, the evidence must "possess an

exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” Id. at 489. In Trombetta, the Court considered “whether the Due Process Clause requires law enforcement agencies to preserve breath samples of suspected drunken drivers in order for the results of breath-analysis tests to be admissible in criminal prosecutions.” Id. at 481. The Court found that failure to preserve the breath samples was not a violation of due process because the evidence from the breath samples was more likely to be inculpatory than exculpatory, and the defendants had other means of demonstrating their innocence, such as inspecting the breathalyzer machine and cross-examining the officer who conducted the test. Id. at 490.

Monson’s case is easily distinguishable from Trombetta. In Trombetta, while the breath sample itself was not preserved, the results of the breath analysis test were preserved. Thus, the defendant had *some* alternative evidence by which to challenge the government’s allegations without the actual breath samples. In this case, however, the alleged marijuana plants were not preserved, nor were any tests performed to determine whether the plants were cultivated marijuana or feral hemp. As it stands now, Monson is without any means to defend the charges against him, as he cannot refute the government’s tests (which do not exist) *or* conduct his own tests on the plants. By failing to preserve the evidence or any sample thereof, the government has deprived Monson of his due process right to “a meaningful opportunity to present a complete defense.” Trombetta, 467 U.S. at 485.

The facts of Monson’s case are remarkably similar to United States v. Belcher, 762 F. Supp. 666 (W.D. Va. 1991). In Belcher, the defendants were charged with manufacturing

marijuana. As in Monson’s case, the government destroyed the alleged marijuana without testing it. The court set out the applicable test under Trombetta, but noted, “The Supreme Court has recently added a caveat to the Trombetta test: ‘unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.’” 762 F. Supp. at 672, citing Arizona v. Youngblood, 488 U.S. 51, 58 (1988). Nevertheless, the court found the Youngblood caveat inapplicable in the Belchers’ case for two reasons. First, in Youngblood, “the prosecution did not attempt to make any use of the [lost evidence] in its own case in chief.” 762 F. Supp. at 672, citing Youngblood, 488 U.S. at 56. Rather, Youngblood was convicted based on evidence independent of that which was lost. In Belcher, by contrast, the court noted that “the government *must* use testimony regarding the alleged marijuana if it is to convict the Belchers.” 762 F. Supp. at 672 (emphasis in original).

The Belcher court also distinguished Youngblood based on its requirement of “potentially useful evidence.” In Youngblood, the government had sufficient evidence to convict the defendant without the evidence that had been lost. In Belcher, however, the court stated:

The contrast here is marked; rather than evidence that is simply “potentially useful,” the destroyed evidence at issue is absolutely crucial and determinative to this prosecution’s outcome. Based on this scrutiny of the facts and language in Youngblood, the court is persuaded that the Supreme Court did not intend for the Youngblood caveat to apply to every instance where State officials intentionally destroy evidence that is material to a defendant’s guilt or innocence. In a case where State officials intentionally destroy evidence that is absolutely crucial and determinative to a prosecution’s outcome, the court holds that the Youngblood caveat does not apply.

Id. Because the Youngblood bad faith requirement was inapplicable, the court analyzed the facts solely under the Trombetta test, which required the defendants to show that the evidence had an exculpatory value that was apparent before it was destroyed, and they were unable to obtain comparable evidence by other reasonably available means. Id. at 672, citing Trombetta, 467 U.S. at 489. The court found the second prong of the Trombetta test easily satisfied because “it is clear that the Belchers certainly could not secure ‘comparable evidence by other reasonably available means.’” Id. The court stated, “[T]he Belchers’ alleged crimes concern formerly-distinct plants that no longer exist and that were never tested to determine what they were. The information those plants contained is lost forever and will never be available to the Belchers.” Id.

The court found it less clear, however, whether the plants had an exculpatory value that was apparent before the State officials destroyed the plants, as required to satisfy the first prong of Trombetta. The court reasoned:

Without a doubt the State officials would swear that the plants were marijuana. From this, the court assumes that the government would argue that the plants had no exculpatory value because the State officials are certain the plants were marijuana. It is a troubling prospect if government officials can routinely destroy drugs, then argue that the drugs had no exculpatory value because the government officials “knew” that the drugs were indeed drugs.

Id. at 672-73.<sup>1</sup> The Court further stated:

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<sup>1</sup> The court recalled a recent criminal trial in which a forensic chemist testified that, when confronted with a substance claimed to be marijuana, he performs three separate tests: one visual inspection under a microscope, and two complex chemical tests. According to the chemist, before the substance can be identified as marijuana, it must render a positive result on all three tests. “Most telling,” the court found, was that “the chemist reported that he had received plants from law enforcement officers who ‘swore’ that the plants were marijuana. When tested, the plants turned out not to be marijuana.” 762 F. Supp. at 673, n.4.

The court is certain that law enforcement officials are almost always correct in determining, by a simple visual inspection, whether a plant is marijuana or not. But, it is the “almost” that convinces the court not to allow this prosecution to go forward. Law enforcement officials are not infallible, and it is certainly conceivable that laboratory results might occasionally exculpate someone accused of manufacturing marijuana or some other drug. Given the facts in this case, the court finds that it would be a violation of due process to prosecute the Belchers.

Id. at 673. Accordingly, the court granted the defendants’ motion to dismiss the indictment.

By contrast, in United States v. Bucci, 468 F. Supp. 2d 251 (D. Mass. 2006), the DEA destroyed all but a representative sample of the 453 pounds of marijuana it had seized from the defendant. The defendant moved to dismiss the indictment because the destruction of evidence violated his due process rights “by depriving him of the opportunity to inspect and weigh the marijuana he [was] charged with possessing.” Id. at 253. The defendant relied primarily upon Belcher, which the Bucci court found “readily distinguishable”:

In Belcher, the alleged marijuana plants were destroyed before any tests were conducted to confirm the officer’s visual determination that they were, in fact, marijuana plants. As a result, the court properly concluded that the defendants were deprived the opportunity to challenge the allegations against them since the plants were never tested before they were destroyed, and the defendants therefore lacked means to refute the government’s assertion that the plants were marijuana. In contrast, Bucci is free to re-test the remaining marijuana or challenge the tests and measurements that have been conducted.

Id. at 254 (citations omitted). As a result, Bucci’s motion was denied.

The facts of Monson’s case mirror those of Belcher, not Bucci. However, the Belcher and Bucci courts *both* recognized that a due process violation occurs when the government destroys marijuana plants without testing them, leaving the defendant no opportunity to refute the government’s assertion that the plants were, in fact, marijuana. This case raises the additional question of whether the plants were intentionally cultivated or were wild. The

government destroyed the alleged marijuana plants without performing any tests. Allowing that evidence to be used against Monson would violate his right to due process by leaving him no opportunity to present a defense. Aside from the plants, the government's evidence consists of 67 pounds of harvested marijuana allegedly found in Monson's home. The government has charged Monson with manufacturing and possessing with intent to deliver *100 kilograms or more* of marijuana. The government's destruction of the plants leaves the defendant without any means to effectively rebut the officers' claims that all of the burned plants were cultivated marijuana. Accordingly, the indictment must be dismissed.

The same result has been reached by other courts when faced with similar facts. For instance, in United States v. Bohl, 25 F.3d 904, 913-14 (10<sup>th</sup> Cir. 1994), the defendants were charged with using nonconforming steel in the fabrication of radio transmission towers for the FAA. The steel samples were destroyed, and the only available "substitute evidence" consisted of photographs, minimal samples which were too small to test, and the government's test results, which were based on challenged methodologies. The Tenth Circuit concluded that "the government denied [the defendants] a meaningful opportunity to present a defense by intentionally disposing of potentially exculpatory and highly probative evidence in the face of [the defendants'] repeated requests for pretrial access to that evidence." Id. at 906. As a result, the defendants' convictions were reversed.

Similarly, in United States v. Cooper, 983 F.2d 928 (9<sup>th</sup> Cir. 1993), the government destroyed chemical laboratory equipment the defendants had allegedly used to manufacture methamphetamine. The defendants argued that they ran a legitimate laboratory which produced naval jelly and dextran sulfate, and that their equipment did not have the physical capacity to manufacture methamphetamine. The court ruled that general

descriptions and photographs of the equipment, which would not provide the needed detail to address the legitimate, technical defense raised by the defendants, were not an “adequate substitute for the laboratory equipment.” Id. at 932. Accordingly, because the government had deprived the defendants of the opportunity to present a defense, the Ninth Circuit affirmed the dismissal of the indictment.

Finally, in United States v. Elliott, 83 F. Supp. 2d 637, 643-44 (E.D. Va. 1999), the defendant was arrested following a traffic stop, a search incident to arrest yielded laboratory glassware, tubing, stoppers, chemicals, plastic gloves and filters. The interior of some of the glassware contained residue of an unidentified substance. The items were tested for fingerprints and destroyed. No tests were conducted to determine the chemical composition of the residue. The defendant was charged with conspiracy to possess, manufacture and distribute methamphetamine. The court considered, under Trombetta, whether the glassware had an exculpatory value that was apparent to law enforcement before it was destroyed. The court stated:

A reasonable law enforcement officer, vested with the knowledge that the glassware could be used in making methamphetamine, would be warranted in concluding that the residue on the inside of some of the glassware might be residue of methamphetamine or the chemical components from which it is manufactured, or both. ... On the other hand, a reasonable law enforcement agent would recognize that, if the residue was not that of methamphetamine or its chemical constituents, that evidence would be of exculpatory value for it would suggest a use other than an illegal one.

83 F. Supp. 2d at 643. Accordingly, the court held, “[I]t is beyond serious question that a reasonable law enforcement agent would recognize, before the glassware was destroyed, that it was of potentially exculpatory value.” Id.

The Elliott court also found the second prong of the Trombetta test satisfied because comparable evidence could not be obtained by other reasonably available means:

[T]here is no reasonably available alternative means of ascertaining the chemical contents of the residue which was observed in some of the glassware. Nor is it possible otherwise to confirm whether the two fingerprints of the defendant were located on the glassware which contained a residue or whether they were located on a piece of glassware which contained no residue. Under the circumstances presented by this record, there is no alternative evidence of these points, both of which are potentially exculpatory.

Id. at 643-44.

Finally, the Elliott court considered whether the evidence was destroyed in bad faith. The government argued that a finding of bad faith was precluded because the evidence was destroyed pursuant to Department of Justice policy, which provides:

This regulation is intended to prevent the warehousing of large quantities of seized contraband drugs which are unnecessary for due process in criminal cases. Such stockpiling of contraband drugs presents inordinate security and storage problems which create additional economic burdens on limited law enforcement resources of the United States.

83 F. Supp. 2d at 645, citing 28 C.F.R. § 50.21(c). “[T]he regulation governs the disposal of large amounts (referred to as threshold amounts) of contraband drugs in excess of stated representative samples. The regulation defines a representative sample to mean ‘the exemplar for testing and a sample aggregate portion of the whole amount seized sufficient for current criminal evidentiary practice.’” Id., citing 28 C.F.R. § 50.21(d)(3). The regulation also “requires 60 days notice to the United States Attorney before destruction may be had. And, in the event of destruction, the regulation explicitly requires that the United States ‘isolate and retain the appropriate threshold amount of contraband drug evidence’ ... ‘until the evidence is no longer required for legal proceedings.’” Id., citing 28 C.F.R. §§

50.21(e)(4) and (5). Because the DEA did not follow these procedures, however, the court found that bad faith was evident, stating:

Where, as here, there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the Trombetta/Youngblood test.

Id. at 647-48.

Subsequently, in a motion for reconsideration, the government argued that the DEA agent did not act in bad faith because he did not have a specific intent to harm the defendant when he destroyed the evidence. The Elliott court responded:

Viewed as a whole, neither Trombetta nor Youngblood nor their progeny require a defendant to prove that the mental state of the police officer at the time of destruction was to foreclose a defense or to deliberately deny the defendant's due process rights. ... Contrary to the argument of the United States, [bad faith] is not confined to the circumstance in which the DEA agent deliberately says unto himself, "I shall deprive the defendant of due process or hurt his case." If that were the test, there would be no check on the destruction of evidence because law enforcement agents would be able to defend the destruction of evidence by lying about subjective intent or by violating, with impunity, the rules they are obligated to follow. ... In any event, bad faith exists when conduct is knowingly engaged in or where it is reckless.

83 F. Supp. 2d at 650.

The same result is warranted in Monson's case. Law enforcement officers seized suspected cultivated marijuana plants from an outdoor grow operation located in an area where feral hemp was ubiquitous. Law enforcement officers know that feral hemp or "ditch weed" contains very little THC, the psychoactive agent present in marijuana. Given the circumstances, a reasonable law enforcement officer would have recognized the importance

of securing and maintaining the plants should the defendant challenge whether a particular plant was marijuana or whether it was cultivated. With the plants having been destroyed, there is certainly no reasonably available alternative means to determine whether the plants were marijuana or whether they were cultivated. As the Belcher court recognized, under these circumstances, the Youngblood bad faith requirement is inapplicable. However, even if a showing of bad faith is required, it is easily established in Monson's case. As in Elliott, the officers knowingly destroyed evidence that had potentially exculpatory value and was essential to protect Monson's due process rights in a criminal prosecution. Moreover, the officers did so without retaining a representative sample of each plant for testing. Thus, the Trombetta/Youngblood test is clearly satisfied in this case.

In order to convict Monson of the charges alleged in the indictment, the government must prove, beyond a reasonable doubt, that he manufactured or possessed with intent to distribute 100 kilograms of marijuana or 100 marijuana plants. The government allegedly seized 67 pounds of marijuana and 35 marijuana plants from the defendant's house, therefore, it must use the plants allegedly seized from an outdoor grow operation to reach the 100 plant threshold required by the indictment. The government will no doubt attempt to rely on the officer's opinion that the plants seized were cultivated marijuana. The defendant will have no reasonable means of rebutting this testimony. The defendant cannot submit photographs of the plants for chemical analysis. This is simply unacceptable. Not only did the government fail to conduct its own tests to determine whether the plants were actually marijuana, and then further whether they were cultivated, it completely eliminated any opportunity Monson might have to examine the evidence and conduct his own tests.

Allowing the government to use the destroyed plants as evidence against Mr. Monson is a clear violation of his right to due process.

### **CONCLUSION**

The indictment must be dismissed because the government violated Monson's Fifth Amendment Due Process rights by depriving him of access to potentially exculpatory evidence, in violation of the standards set out in California v. Trombetta, 467 U.S. 479 (1982). Without the destroyed evidence, the government cannot prove that Mr. Monson possessed or manufactured 100 or more kilograms of marijuana or 100 or more marijuana plants, as alleged in the indictment. The Court should therefore grant Monson's Motion to Dismiss.

Respectfully submitted,

DEJAY MONSON, Defendant,

By s/ Michael F. Maloney

**Michael F. Maloney: 19085**

Attorney for Defendant

ASSISTANT FEDERAL PUBLIC DEFENDER

222 South 15<sup>th</sup> Street, #300N

Omaha, NE 68102

Telephone: (402) 221-7896

Fax: (402) 221-7884

E-Mail: mike\_maloney@fd.org

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 17, 2009, I electronically filed the foregoing with the Clerk of Court, using the ECM/ECF system, which sent notification of such filing to the following: Kimberly C. Bunjer, Assistant U.S. Attorney.

s/ Michael F. Maloney