

JUN 23 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH POON MAH,

Defendant - Appellant.

No. 10-50568

D.C. No. 3:09-cr-01564-BEN

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted June 15, 2011**

Before: CANBY, O'SCANNLAIN, and FISHER, Circuit Judges.

Kenneth Poon Mah appeals from the 60-month sentence imposed following his guilty-plea conviction for manufacturing marijuana and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Mah contends that the district court erred in determining that he was ineligible for safety-valve relief under U.S.S.G. § 5C1.2, because it applied a clearly improbable burden of proof. We agree. *See United States v. Ferryman*, 444 F.3d 1183, 1186 (9th Cir. 2006) (the burden is on the defendant to prove by a preponderance of the evidence that he qualifies for safety valve relief).

The case is remanded for the district court to determine whether Mah can prove, by a preponderance of the evidence, that he qualifies for safety-valve relief. *See United States v. Nelson*, 222 F.3d 545, 550-51 (9th Cir. 2000).

VACATED and REMANDED.