UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-602-CR-ZLOCH/ROSENBAUM
CASE NO. 90-260-CR-ZLOCH/ROSENBAUM

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES MARTIN MALONE,
Defendant.
_____:

OBJECTION TO THE PRESENTENCE INVESTIGATION REPORT

The defendant, James Martin Malone, through counsel, respectfully files his objections to the Presentence Investigation Report (PSIR), and in support thereof, Mr. Malone states:

Background

In case number 89-602-Cr-ZLOCH, Mr. Malone and 12 co-defendants were charged by indictment with conspiracy to import five or more kilograms of cocaine in violation of 21 U.S.C. §§ 952 and 963 in September of 1989. On October 6, 1989, Mr. Malone was released from custody after posting bond.

Prior to trial and pursuant to Title 21 U.S.C. § 851, the government filed an

information and notice of intent to rely upon a prior narcotics conviction as grounds for increased punishment for Mr. Malone. The information and notice alleged that in 1986, Mr. Malone was convicted of conspiracy to import marijuana in the United States District Court for the Eastern District Louisiana. Pursuant to 21 U.S.C. §§ 960(b)(1)(B) and 963, the term of imprisonment was increased from a mandatory minimum term of 10 years to 20 years imprisonment due to Mr. Malone's prior narcotics offense conviction.

In January of 1990, the case proceeded to trial. However, on January 29, 1990, near the conclusion of the trial, Mr. Malone failed to appear in court. On January 31, 1990, the jury found Mr. Malone guilty of conspiracy to import cocaine in absentia. On April 19, 1990, Mr. Malone was indicted for failure to appear and contempt of court in case number 90-260-Cr-Zloch.

On February 12, 2012, Mr. Malone was arrested in Ecuador. He was extradited to the United States and on April 4, 2012, pled guilty to failure to appear in case number 90-260-Cr-Zloch. Mr. Malone is scheduled to be sentenced for the cocaine importation case and the failure to appear case on June 18, 2012. A single Presentence Investigation Report (PSIR) has been prepared for both cases.

Objection to Statutory Minimum Mandatory Sentence and Maximum Sentences

Mr. Malone objects to all references in the PSIR concerning the statutory mandatory minimum and maximum terms of imprisonment for the cocaine importation conspiracy. The Probation Officer indicates that the penalty for the cocaine importation offense is 20 years

to life imprisonment. PSIR pg 2 and ¶ 135. The jury verdict does not reflect a specific quantity of cocaine attributable to Mr. Malone. Accordingly, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), the statutory penalty for the importation offense is 0 to 20 years imprisonment.

In addition, Mr. Malone would submit that because the jury made no specific finding as to the quantity of the cocaine for which he was responsible, the imposition of a mandatory minimum sentence would be unconstitutional. Under the Sixth Amendment of the United States Constitution, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge. *See Blakely v. Washington*, 542 U.S. 296, 303-304, 124 S.Ct. 2531, 2537. *But see Spero v. United States*, 375 F.3d 1285, 1287 (11th Cir. 2004)(statutory sentencing factors that trigger statutory minimum need not be found by jury, provided that mandatory minimum term does not exceed otherwise applicable statutory maximum).

Furthermore, Mr. Malone, would submit that because the jury did not find that he had been previously convicted of a prior narcotics felony, the Court is precluded from imposing a mandatory minimum 20 year sentence pursuant to the sentencing provisions of 21 U.S.C. § 961(b)(1)(B). *But see Almendarez-Torres v. United States,* 523 U.S. 224, 247, 118 S.Ct. 1219 (1998)(the government need not prove beyond a reasonable doubt that a defendant had prior convictions or allege those prior convictions in the indictment in order to use those convictions to enhance a defendant's sentence).

Finally, Mr. Malone would submit that sentencing him to a mandatory 20-year term

of imprisonment when he was at best, a minor participant in the cocaine importation scheme is inherently unfair and possibly a due process violation. *See United States v. Jones*, 145 F.3d 959, 970-71 (8th Cir. 1998)(Bright dissenting)(mandatory minimums are inherently unfair because among other reasons, their application depends, in most cases, upon the presence of only one factor and do not permit a judge to take into account the defendant's role in the offense).

Objection to Offense Level Computation and Role Assessment

The Probation concludes that Mr. Malone's total offense is level 34. PSIR ¶ 111. The Probation Officer found that the base offense level was 34 because the offense involved more than 150 kilograms of cocaine. PSIR ¶ 103. Pursuant to the drug quantity table, USSG § 2D1.1(c), the offense level specified for an offense involving 150 kilograms is level 38. However, pursuant to § 2D1.1(a)(5), if the defendant (A) receives an adjustment under § 3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is level 38, the base offense level shall be decreased by 4 levels. Hence, the probation officer concluded that the base offense was level 34. *See* PSIR ¶ 34.

Pursuant to § 3B1.2(b), the offense level was reduced 2-levels because the probation officer found Mr. Malone to be a minor participant. PSIR ¶ 106. However, 2-levels were added for obstruction of justice, § 3C1.1 because Mr. Malone fled the district prior to the jury verdict. PSIR ¶ 107. Therefore, the Probation Officer found that the total offense level was level 34. At offense level 34, and criminal history category II, the advisory imprisonment

range is 168 to 210 months.

The investigation into this offense began when co-conspirator Michael Shanley recruited a Drug Enforcement Administration (DEA) confidential informant to captain a vessel to the Bahamas and bring into the United States 700 kilograms of cocaine. PSIR ¶ 9. Shanley's plan to import 700 grams of cocaine was part of a large scale importation scheme involving 5600 kilograms of cocaine aboard a freighter off the coast of the Bahama Islands. *See* PSIR ¶¶ 26, 39 and 78. The freighter was offloaded near Moore's Island, a district of the Bahamas. PSIR ¶ 58. Cocaine was transferred from the freighter to smaller vessels. PSIR ¶ 59. One of those smaller vessels transferred approximately 800 kilograms of cocaine to a vessel operated by the confidential informant and co-conspirator Gregory Zaccardi. PSIR ¶ 67. The confidential informant and Mr. Zaccardi imported the cocaine into the United States by bringing it to the Miami Marina. PSIR ¶ 68.

After the 800 kilograms of cocaine had been imported into the United States by the confidential informant and Mr. Zaccardi, Mr. Malone arrived at the marina driving a Lincoln Continental to drive them to Mr. Shanley's residence. Prior to leaving the marina, the confidential informant placed 100 kilograms of cocaine in the trunk of the Lincoln Continental. PSIR ¶ 68. Mr. Malone then drove to the Shanley's residence and entered the residence with Mr. Zaccardi. PSIR ¶ 69. The confidential informant took 40 kilograms of cocaine to a storage facility. PSIR ¶ 69. The remaining cocaine was unloaded from the Lincoln and placed inside Shanley's residence. PSIR ¶ 69. Mr. Malone was arrested the

following day while driving the Lincoln. PSIR ¶ 76.

Mr. Malone objects to the Probation Officer's offense level computation and role assessment. Mr. Malone contends that the total offense level should be level 30. Mr. Malone disputes paragraph 103 of PSIR which states that the offense involved over 150 kilograms of cocaine. When a defendant is convicted of participating in a drug-trafficking conspiracy, the court must sentence the defendant based on an individualized finding, supportable by a preponderance of the evidence, as to the drug quantity foreseeable by that defendant. *United States v. Bacon*, 598 F.3d 772 (11th Cir. 2010).

The probation officer found that Mr. Malone was recruited by Mr. Shanley, to assist in the transport of the 700 kilograms of cocaine from the Bahamas to the United States. PSIR ¶ 92. However, the Offense Conduct Section does not contain any facts which support a finding that Mr. Malone knew of and should have foreseen that Shanley had arranged to import more than 100 kilograms of cocaine from the Bahamas. The confidential source only placed 100 kilograms in the Lincoln Continental. Moreover, technically Mr. Malone did not assist with the importation of any cocaine. By the time Mr. Malone became involved in the offense, the importation had been completed.

If Mr. Malone is only held responsible for 100 kilograms of cocaine, the base offense level pursuant to the drug quantity table, USSG § 2D1.1(c), would be level 36. The base offense level would then be reduced by 3-levels pursuant to offense level 33 § 2D1.1(a)(5). At offense 33 and Criminal History Category II, Mr. Malone's advisory guideline range for

case number 89-602-Cr-Zloch without regard to any statutory minimum would be 151 to 188 months.

Mr. Malone further contends that he is only a minimal participant in this offense. Under USSG § 3B1.2(a), a minimal participant is a defendant who plays a minimal role in concerted activity and is plainly among the least culpable of those involved in the conduct of a group. *See* § 3B1.2, comment. n. 4. A defendant's lack of knowledge or understanding of the scope and structure of the enterprise is indicative of a role as minimal participant. *Id*.

The Probation Officer has expressly identified Mr. Malone as being one of the least culpable of the indicted conspirators. PSIR ¶ 92. In addition, the Offense Conduct Section of the PSIR does not contain any facts which would indicate that Mr. Malone knew and understood the scope and structure of the importation scheme. Accordingly, the Court should find that Mr. Malone was a minimal participant in the importation conspiracy.

If the Court were to find that Mr. Malone was a minimal participant, the base offense offense level would be level 32 pursuant to § 2D1.1(a)(5). The offense level would then be reduced another 4-levels pursuant to USSG § 3B1.2(a), n.6 (in a case in which the court applied § 2D1.1 and the defendant's base offense level was reduced by the operation of the maximum base offense level in § 2D1.1(a)(5), the court shall also apply the appropriate adjustment under this guideline). Accordingly, if the Court were to find that Mr. Malone was a minimal participant, the total offense level after the 2-level increase for objection of justice would be level 30. At offense level 30, and criminal history category II, the advisory

guideline is 108 to 135 months.

Conclusion

Mr. Malone respectfully request that this Court find that a 20 year mandatory minimum sentence of imprisonment need not be imposed in this case; sustain his objection to the amount of cocaine attributable to him; and find that he was a minimal participant in the offense. Upon making these findings, Mr. Malone would respectfully request that this Court sentence him within the guideline range of 108 to 135 months imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on May 31, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/Daryl E. Wilcox*
Daryl E. Wilcox

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