UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES MARTIN MALONE,
Defendant.
_____:

DEFENDANT'S RESPONSE TO GOVERNMENT'S SECOND SENTENCING MEMORANDUM

The defendant, James Martin Malone, through counsel, hereby files his response to the Government's second sentencing memorandum, and in support thereof, Mr. Malone states:

Procedural 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) was prepared for both cases.

On June 18, 2012, a sentencing hearing was held. Mr. Malone had filed objections to the PSIR which included an objection to the Court imposing a 20-year mandatory prison sentence because *inter alia*, the jury had not made a specific finding as to the amount of cocaine for which Mr. Malone was responsible. *See* D.E. # 620, pg.

At the sentencing hearing, the Court heard arguments from both the government and the defense. The Court sustained the defendant's objection that the Court could not make a finding as to the amount of cocaine attributable to Mr. Malone. D.E. # 627, Transcript of Sentencing Hearing, pg. 30. Specifically, the Court stated "I have no way of looking into the minds of the 12 members of that jury that returned this verdict and knowing what they had in mind so I will sustain the defendant's objection." *Id*.

The Court then ask the probation officer to determine the guideline computation with no

finding as to the amount of cocaine. The Probation Officer advised the Court that the offense level would be level 12. The government then requested that the sentencing hearing be recessed to permit the government to review the trial transcript to determine whether there existed evidence which would support a finding as to the amount attributable to Mr. Malone. D.E. # 627, pgs 32-34.

The Court granted the government's request and directed the Probation Officer to prepare an addendum to the PSIR if the Court were still unable to find any amount of cocaine attributable to Mr. Malone. The Sentencing hearing was rescheduled for September 20, 2012, and later rescheduled for September 26, 2012.

Per the Court's directive, the Probation Office prepared an addendum to the PSIR and concluded that if the Court were to determine that Mr. Malone could not be held accountable for any amount of cocaine, Mr. Malone's guideline range would be determined by the failure to appear guidelines. Without a reduction for acceptance of responsibility, the undersigned estimates that the guideline range will be 21 to 27 months. With a reduction for acceptance of responsibility the guideline range would be 15 to w1 months.

On September 24, 2012, the government filed a second sentencing memorandum. The government urges the Court to rely on testimony contained in the trial transcript to determine that Mr. Malone was in possession of 100 kilograms.

Mr. Malone contends that trial testimony does not alter the Courts initial assessment, that the Court has no way of knowing what was in the minds of the 12 jurors that returned the verdict. Accordingly, it is Mr. Malone's position that the Court cannot make a finding as to the amount of cocaine attributable to Mr. Malone.

Argument and Memorandum of Law

At the outset, Mr. Malone unequivocally objects to any amount of cocaine being attributable to him. In his objections to the PSIR and at the initial sentencing hearing, Mr. Malone objected to the imposition of a mandatory minimum sentence mandatory because the jury made no finding as to the amount of cocaine attributable to him. Mr. Malone reasserts that objection, and would further object to any facts contained in the PSIR which would attribute an amount of cocaine to him.

In its second sentencing memorandum, the government relies on excerpts of the transcript to corroborate the offense conduct section of the PSIR. However, this does not alter the Court's initial assessment that there is no way to look into the minds of the jurors that returned the verdict. *See United States v. McGuinness*, 769 F.2d 695 (11th Cir. 1985)(Judge who was unfamiliar with trial transcript of trial and unfamiliar with trial from any other means was precluded from imposing sentence).

The government asserts that Malone did not contest the amount of cocaine at trial and only contested knowledge. This does not alter the fact that the Jury did not make a specific finding and was not instructed to make a specific finding as to the amount of cocaine attributable to Mr. Malone.

Under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), the weight of drugs is an element that must be proved to a jury beyond a reasonable doubt. *See United States v. Sanders*, 668 F.3d 1298, 1310 (11th Cir. 2012)(....Apprendi requires that the indictment must charge—and the jury must find beyond a reasonable doubt—that the offense "involv[ed]" a particular drug type and quantity before a defendant may receive a sentence above the maximum penalty).

It does not logically follow that drug quantity can be viewed as an element for purposes of determining the applicable maximum sentence but be viewed as a sentencing factor for determining

the applicability of a mandatory minimum penalty. *See United States v. Gonzalez*, 420 F.3d 111, 122 (2d Cr. 2005). Accordingly, in the absence of a jury finding that Mr. Malone possessed at least 5 kilograms of cocaine, Mr. Malone cannot be subject to a minimum mandatory sentence of 20 years imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on September 26, 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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SERVICE LIST
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