

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA

*

v.

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CRIMINAL NO. CCB-03-0369

Defendant No.: 007

JONATHAN MALONE

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**DEFENDANT JONATHAN MALONE'S SENTENCING MEMORANDUM AND
MOTION FOR DEPARTURE**

Jonathan Malone, Defendant, by and through Anton J. S. Keating, his attorney, respectfully submits this memorandum regarding his sentencing scheduled for November 8, 2004.

INTRODUCTION AND BACKGROUND

On March 30, 2004, Mr. Malone signed a plea agreement with the United States Attorney's Office agreeing to plead guilty to participating in a conspiracy to distribute a controlled substance, namely marijuana, in violation of 21 U.S.C. § 846. The Presentence Report established Mr. Malone's base offense level under § 2D1.1 of the United States Sentencing Guidelines (hereinafter "the USSG") at 30, given the amount of marijuana that was distributed by the conspiracy. See Presentence Report ¶16. While the parties further agreed that Mr. Malone was convicted of escape on November 28, 1983, they disagree as to whether that offense constituted a crime of violence and consequently disagree as to whether that conviction should operate to increase the offense level to 34, pursuant to USSG § 4B1.1. Both parties also agreed to waive their right to appeal from the Court's determination of the applicable adjusted offense level, and reserved only the right to appeal from adverse departure rulings.

Mr. Malone has reviewed the Presentence Report with counsel and has several substantial objections to the factual averments or guidelines calculations, as specifically set forth herein.

Mr. Malone disagrees that his criminal history is accurately reflected in paragraphs 25 through 45 of the Presentence Report, and while he agrees that the applicable Criminal History Category might be VI, he respectfully suggests to this Court that a Criminal History Category of VI over-represents his dangerousness to the community and the likelihood that he will commit further crimes.

The purpose of this memorandum is to set forth the factual and legal bases for Defendant's contentions (a) that his prior conviction of escape does not constitute a conviction of a crime of violence, and (b) that placement of Mr. Malone in the highest criminal history category significantly over-represents his criminal history and warrants a departure pursuant to USSG §4A1.3.

STATEMENT OF FACTS

On April 27, 1983, Mr. Malone, who was twenty years old at the time, was transported by the Baltimore City Sheriff's Department to the Juvenile Division of the Circuit Court for Baltimore City.¹ While Mr. Malone was sitting in the courtroom, he realized that he although was an adult, he was being arraigned in the Juvenile Court. He also realized that the charges for which he was transported to appear before the Juvenile Court were against a person with a name different from his own. He, thus believed that he was in this proceeding by mistake and simply got up from his seat, and walked out of the courtroom and the courthouse itself. At no time did he attempt to hide his intentions from the correctional officers present in the courtroom. None of the aforesaid officers attempted to question or to interfere with Mr. Malone's exit. Mr. Malone's attorney at the time, Ms. Rosemary Ranier², an Assistant Public Defender for Baltimore City, along with an Assistant State's Attorney, were present in the courtroom and they also did not object to his departure.

On November 28, 1983, Mr. Malone appeared before the court on the charge of escape and other unrelated charges. Realizing that sentences for these unrelated charges would be severe, Mr. Malone pled guilty to the escape charge and received a sentence of four years at the Department of Corrections. While a four-year prison term for an escape under the facts set forth above may seem excessive, it should be noted that Mr. Malone's plea was part of a comprehensive plea agreement with the State's Attorney Office. Under the terms of that comprehensive plea agreement, Mr. Malone was to plead guilty to the charges of Escape, Robbery, Theft (2 counts), Making a False Statement, Unauthorized Use of a Vehicle, Driving Without a License, Possession of Heroin, and Possession of Paraphernalia, in return for a ten-year sentence for all offense combined. The escape sentence, which issued one day before all the other sentences, ran concurrently with all other sentences imposed. Mr. Malone satisfied this sentence on November 28, 1987.

ARGUMENT

I. THE AMBIGUOUS DEFINITION OF "ESCAPE" ALLOWS THE COURT TO LOOK BEYOND THE MERE FACT OF THE CONVICTION.

At issue here is whether Mr. Malone's conviction for escape constitutes a crime of violence within the meaning of USSG § 4B1.1. The applicable guideline, USSG § 4B1.1 comment n. 1, incorporates the definition of "crime of violence" set forth at USSG § 4B1.2, as follows:

The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that -

(1) has an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Since escape is not among those offenses enumerated in USSG § 4B1.2(a)(2), the Court must first determine whether the offense under Maryland law categorically includes as an element the use, attempted use, or threatened use of physical force. Since escape offenses generally do not contain such an element, see *United States v. Hairston*, 71 F.3d 115, 117 (4th Cir. 1995), the Court must look to "the statutory definition of the offense." *Id.* If that definition does not involve "generic conduct with the potential for serious physical injury to another, the offense is not a crime of violence." *Id.* Should the definition be ambiguous in that regard, and suggest that the offense at issue could be committed in multiple ways, some of which require a finding that physical force was used, while others do not, "it is appropriate for a court to look beyond the fact of conviction and the element of the offense" to the charging documents and jury instructions in deciding whether an offense constitutes a crime of violence. *United States v. Coleman*, 158 F.3d 199, 202 (4th Cir. 1998) (en banc).

In Maryland "escape retains its judicially determined meaning." Md. Code Ann., Criminal Law § 9-401(c) (West 2004). In the absence of a specific definition of "escape", and in light of the fact that escape can be effected through peaceful, non-violent means, it is appropriate for the sentencing court to look beyond the fact of Mr. Malone's conviction and into the circumstances of his actual escape.

This distinction between violent and non-violent escapes is also consistent with common law which distinguished non-violent escapes from the violent breach of prison offenses. See Rollin M. Perkins, *Perkins on Criminal Law*, at 502, Foundation Press Inc., Mineola, New York (1969). Under the common law, escape, if accomplished by force, was called "breach of prison"

and was a graver offense than if no force was used. *Id.* at 501. "Escape" on the other hand, was defined as "unauthorized departure of a prisoner from legal custody without the use of force." *Id.* Clearly, under the common law, Mr. Malone would only be guilty of escape, a misdemeanor, and would not be guilty of breach of prison - a violent felony.

II. USSG § 2P1.1 RECOGNIZES AND ACCOMMODATES NON-VIOLENT ESCAPES.

A plain reading of USSG § 2P1.1 demonstrates that that the sentencing Commission recognizes, and had made a distinction, between violent escapes and non-violent escapes when it drafted the guidelines. According to this section, if an escape can be characterized by "use of the threat of force against any person," then the escape should be considered violent and the base offense level of 13 should be increased by five levels. See USSG § 2P1(b)(1). If the escape cannot be so characterized, then it is a non-violent escape and no enhancement is authorized by the guidelines.

Further support for the proposition that escapes may be non-violent and may not qualify as a "crime of violence" for the purposes of USSG § 4B1.1 career offender status can be found in the definitions section of USSG § 4B1.2, quoted *infra* in full. The offense of escape is notably absent from the list of categorical crimes of violence. Mr. Malone submits that this omission is further indication that the United States Sentencing Commission does not consider escape to be categorically a crime of violence. The Commission's express distinction between violent escapes and non-violent escapes, and the difference in punishment for each, as stated in USSG § 2P1.1, precludes escape from inclusion on the list of categorical crimes of violence.

III. THERE WAS NO PROPENSITY FOR VIOLENCE IN MR. MALONE'S ESCAPE.

When one thinks of an escape from custody one generally thinks of escape through the use of force, or stealth, from a guarded correctional facility. One thinks of the likes of Joseph Holmes, affectionately known as "Tunnel Joe", who on February 19, 1951, escaped from the Maryland State Penitentiary through an underground tunnel that he spent several years digging. One also thinks of Richard Zlotkowski, who on May 18, 1950, jumped from the roof of the Maryland State Penitentiary onto the Forrest Street wall. He burst into a guard post while the guard was eating lunch and was shot dead by the guard.³ When contemplating escapes, one does not immediately imagine a young adult simply getting up from his seat inside a courtroom and casually and openly walking out of that courtroom, especially when he is there due to mistaken identity.

It could be argued that cases such as *United States v. Hairston*, 71 F.3d 115 (4th Cir. 1995) and *United States v. Dickerson*, 77 F.3d 774 (4th Cir. 1996) categorically speak of escape as a crime of violence. It should be noted, however, that both of these cases involved efforts to escape from actual lockdown confinement in a barred facility tended by correctional officers charged with the duty of enforcing that confinement. The considerations which prompted the Fourth Circuit's holding in those cases are instructive:

Critical to our conclusion is the chance that in the case of an escape by stealth (emphasis added) the escapee will be intentionally or unintentionally interrupted by another, for example a prison guard, police officer or ordinary citizen. This encounter inherently presents the serious potential risk of physical injury to another, because the escapee, intent on his goal of escaping, faces the decision of whether to dispel the interference or yield to it. To avoid jeopardizing the success of the escape and further punishment upon capture, the escapee may choose to dispel the interference by means of physical force." *Hairston*, 71 F.3d at 118.

The aforementioned considerations are clearly not present in this case. The facts of Mr. Malone's escape do not constitute a "crime of violence" of the type that the legislature of the United States intended to penalize through the passage of USSG § 4B1.1. Mr. Malone's unopposed and unnoticed departure from a public place does not imply that he had any intention of using violence in the event of being challenged or told to sit down or remain where he was. Unlike Dickerson and Hairston, above, the escape here was the result of neither stealth nor force. Rather it was an escape by mistake since Mr. Malone was thinking that he was there erroneously and that he would be free to leave once the error had been discovered and corrected. In this respect, Mr. Malone's escape is very similar to an escape from home detention, which can be effectuated by returning home later than allowed due to a mistake in time keeping. Escapes from home detention do not constitute a crime of violence due to their non-violent character and the myriad ways in which the escape can occur. Mr. Malone's escape also bears those vital qualities, lack of propensity for violence and a multitude of ways in which a mistake can lead to an unintended escape, and should not be ranked among the violent escapes that USSG § 4B1.1 is intended to penalize.

IV. PLACEMENT OF MR. MALONE IN CRIMINAL HISTORY CATEGORY VI SIGNIFICANTLY OVER-REPRESENTS HIS DANGEROUSNESS.

Mr. Malone contends that his placement in the highest criminal history category under the USSG is inappropriate given the nature of the convictions against him and that Category VI substantially over-represents the seriousness of his criminal history.

This Court's ability to look beyond the mere calculation and to depart downward on this ground is well established. USSG § 4A1.3 makes clear that "[t]here may be cases where the court concludes that a defendant's criminal history category significantly over-represents the

seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." The Fourth Circuit has reaffirmed the power of courts to sentence below the ranges dictated by applicable Guidelines should the calculated criminal history category "[overstate] the seriousness of the defendant's past conduct." *United States v. Adkins*, 937 F.2d 947, 952 (4th Cir. 1991). See also *United States v. Pinckney*, 938 F.2d 519 (4th Cir. 1991).

In this case, the pre-sentence investigator found that Defendant's criminal history generated 20 criminal history points. See Presentence Report ¶36. Nine of those points however, were generated as a result of the aforementioned ten-year plea agreement that Mr. Malone entered into on November 28-29, 1983. Another three points were added because on June 8, 1989, Mr. Malone "was found guilty [of possession of cocaine] and sentenced as follows: 10 years suspended, 5 years probation." *Id.* at ¶31. The quoted sentence indicates a mistake on the part of the pre-sentence investigator who prepared the report since it is not possible for a person to receive a sentence of ten years for Possession of Cocaine under the superseded Art. 27 § 287 of the Annotated Code of Maryland. The maximum term of imprisonment authorized by that statute is four years. See Exhibit A.

As stated previously, nine of those twenty criminal history points resulted from that fateful ten-year agreement that Mr. Malone made with the State of Maryland over twenty years ago. The agreement, the terms of which led to Mr. Malone's plea to escape, now results, according to the pre-sentence investigator, an additional 38 to 48 months to his sentence because it places him in a classification of a career offender. Even without this enhancement, Mr. Malone is subject to a sentence of imprisonment from 168 to 210 months should he remain in a Criminal History Category VI. Since the time of the plea agreement twenty years ago, Mr. Malone has not been convicted of any violent or especially notorious crimes. Mr. Malone suggests that a reduction in

his criminal history category is appropriate in light of the circumstances.

V. MR. MALONE HAS INSTRUCTED HIS COUNSEL TO FILE A PETITION FOR WRIT OF ERROR CORAM NOBIS ON HIS BEHALF.

Mr. Malone feels that grave injustice will occur upon him if his 1983 escape conviction is permitted to place him into a career offender status. Accordingly, Mr. Malone instructed his counsel to file a Petition for Writ of Error Coram Nobis on his behalf. That Petition was filed on October 29, 2004, at the Circuit Court for Baltimore City, and a copy of the Petition is attached to this memorandum. See Exhibit B.

Mr. Malone alleges three independent grounds upon which coram nobis relief is warranted in his case. First, Mr. Malone alleges fundamental flaws in the underlying escape charges against him, as one can only be convicted of escape if one already has been convicted and is serving a sentence at the Department of Corrections. At the time of his alleged escape, Mr. Malone was not serving a sentence but was in pretrial custody. Hence, it was legally impossible for him to commit the crime of Escape from Custody as defined by the superseded Md. Code Ann., Art. 27 § 139 (1992). See Exhibit C. The only offense, if any, that Mr. Malone could be charged with, given the facts of his escape, is Failure to Appear in Response to a Citation. Section 12C of Article 27 limits the maximum authorized period of incarceration for this offense to ninety days. See Exhibit D. Given the fact that Mr. Malone was not serving a sentence at the time of his courtroom walkout, his maximum jail exposure should have been ninety days.

Mr. Malone's second argument is that when he pled guilty to an offense of escape in 1983, he could not have reasonably foreseen that Federal Sentencing Guidelines would be promulgated in 1987, four years later, and that under USSG § 4B1.1, his escape conviction would count as a third offense and would place Mr. Malone in a career offender status, thus enhancing his

sentence by 38 to 48 months. At the time of his plea on November 23, 1983, Mr. Malone failed to fully appreciate the collateral consequences that his plea would bring. Due to the fact that the Federal Sentencing Guidelines were not promulgated at the time, there was no competent legal authority that could advise Mr. Malone on this issue. Mr. Malone's guilty plea was not made understandingly and voluntarily under the principals enunciated in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969), nor in accordance with the requirements of the Maryland Rules.

For his final argument, Mr. Malone states that he was constitutionally entitled to resist an improper courtroom presence requirement. Mr. Malone believed that since he found himself in a juvenile court, under the assumption that he was someone else, his appearance was not legally required and that he could not legally be required to remain. In short, he was free to leave. Just as one has the right to resist an unlawful warrantless arrest, *United States v. Di Re*, 332 U.S. 581, 594 (1948), he had the right to resist the improper requirement that he appear and remain in that court at that time. Consequently, he maintains that his conviction for escape was improper and technically flawed.

VI. MR. MALONE'S UNUSALLY SEVERE ESCAPE SENTENCE HAS UNFAIRLY OPERATED TO ALLOW INCLUSION OF HIS ESCAPE CONVICTION INTO HIS CHAPTER FOUR ENHANCEMENTS CALCULATION.

Convictions that resulted in incarceration of less than one year and one month are not included in Chapter Four enhancements calculation if the Defendant was not serving a sentence on them within ten years of the date of the current offense. USSG § 4A1.2(e). On the other hand, convictions that resulted in incarceration over one year and one month period are included in Chapter Four enhancements calculation if the Defendant was serving a sentence on them within fifteen years of the date of the current offense. *Id.*

Mr. Malone was convicted in 1983 and satisfied his sentence in 1987. Because his sentence was over one year and one month, he is subject to the fifteen-year inclusion requirement. Hence, if his escape sentence is allowed to stand, the fifteen-year inclusion period would extend until 2002 and, given that his current offense was committed over a period of five years, starting in 1998, the conviction could be considered in the Chapter Four career offender status determination.

Mr. Malone maintains that given the factual circumstances of his escape, set out above, a sentence of four years could be considered unusually cruel and excessive. At the time of Mr. Malone's plea, the length of incarceration received for it was of minor consequence since Mr. Malone was pleading to longer terms of imprisonment on other unrelated charges. Had he elected to have a trial, it is likely that the sentencing judge would have issued a sentence of less than one year and one month for his escape offense. Consequently, Mr. Malone would only be subject to the ten-year inclusion requirement, which would expire sometime in 1994, four years before the current offense was committed. Thus, Mr. Malone maintains that the excessive period of four-year incarceration for his escape offense has unfairly operated to extend the Chapter Four enhancements inclusion period to fifteen years, contrary to the original intent of the United States Sentencing Commission, which promulgated different inclusion periods for crimes of differing magnitude and notoriety.

It should be noted that a maximum sentence authorized by the superseded Md. Code Ann., Art. 27 § 139(a)(2)(1992) for an escape from a juvenile facility that does not involve an assault is three years. Mr. Malone's four-year sentence, therefore, was unusually cruel and excessive, in violation of Maryland statutory law, Article 25 of the Declaration of Rights of the Constitution of the State of Maryland, and the Eighth Amendment to the Constitution of the

United States of America.

Respectfully submitted,

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