

No.

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# Supreme Court of the United States

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**ROBERT L. MALONE,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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## APPENDIX

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**COMES NOW PETITIONER Robert L. Malone** and submits the attached appendix pursuant to Supreme Court Rules.

  
Robert L. Malone  
Petitioner  
15253-028  
P.O. Box 4000  
Manchester, KY 40962

Date: 8-10-2019

**APPENDIX A**  
**ORDER & JUDGMENT OF THE COURT OF APPEALS**  
**FOR THE SEVENTH CIRCUIT**  
**DATED 5-16-19**

## United States v. Malone

United States Court of Appeals for the Seventh Circuit

May 15, 2019, Argued; May 16, 2019, Decided

Nos. 18-1024 & 18-1089

### Reporter

770 Fed. Appx. 281 \*; 2019 U.S. App. LEXIS 14528 \*\*; 2019 WL 2153339

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT L. MALONE and DONTA HENDERSON, Defendants-Appellants.

**Notice:** PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**Prior History:** **[\*\*1]** Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division. No. 2:15CR00019. Jane E. Magnus-Stinson, Chief Judge.

United States v. Henderson, 2017 U.S. Dist. LEXIS 162133 (S.D. Ind., Oct. 2, 2017)

**Disposition:** AFFIRMED.

**Counsel:** For UNITED STATES OF AMERICA, Plaintiff - Appellee (18-1024): Brian L. Reitz, Attorney, Bradley A. Blackington, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Indianapolis, IN.

For ROBERT L. MALONE, Defendant - Appellant (18-1024): Kent R. Carlson, Attorney, CARLSON & ASSOCIATES, Chicago, IL.

For UNITED STATES OF AMERICA, Plaintiff - Appellee (18-1089): Bradley A. Blackington, Attorney, Brian L. Reitz, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Indianapolis, IN.

For DONTA HENDERSON, Defendant - Appellant (18-1089): Damon R. Leichty, Attorney, Alice Jane Springer, Attorney, BARNES & THORNBURG LLP, South Bend, IN.

**Judges:** Before DIANE P. WOOD, Chief Judge, FRANK H. EASTERBROOK, Circuit Judge, DAVID F. HAMILTON, Circuit Judge.

### Opinion

#### [\*281] Order

For roughly three years a criminal organization imported about four pounds of pure methamphetamine weekly into Vincennes, Indiana. The total substantially exceeded 100 kilograms, and the sentences are correspondingly high.

Robert Malone has been sentenced to 264 months' imprisonment for his role. His **[\*\*2]** statutory floor was 240 months under the version of 21 U.S.C. §841 then in force, and he contends on appeal that any sentence exceeding 240 months is unreasonably high. See *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). The range recommended by the Sentencing Guidelines, however, was 292-365 months, and we have never held that a below-range sentence is illegally high. Malone insists that anything over 240 months is not "necessary", 18 U.S.C. §3553(a), to punish him and deter others similarly situated. Yet how much deterrence is needed, and which deserts are just, are subjects committed to the sentencing judge, subject to appellate review only to the extent needed to catch errors of law and prevent unreasonable assessments. There's nothing unreasonable about this below-range sentence.

Four times during sentencing the district judge

mentioned Malone's criminal history, emphasizing that he committed the current crimes while on probation. Malone contends that four is double counting twice over. Yet how often a judge mentions [\*282] each consideration reflects its importance in the judge's estimation, not some form of multiple counting. The sentencing judge made clear that she thought that Malone is incorrigible. Nothing in the statute or Guidelines sets a cap on the number [\*\*3] of times a judge may mention a consideration she deems important to selecting the right sentence.

Donta Henderson contends that the district judge should have given a buyer-seller instruction drawn from §5.10(A) of this circuit's pattern criminal jury instructions. This instruction asks the jury to distinguish buying drugs with an intent to resell (a substantive offense) from buying drugs as part of an agreement to engage in other similar transactions (a conspiracy). This instruction is appropriate only if the evidence might support an inference that the transactions did not imply an agreement beyond the immediate sales.

In the district court Henderson did not ask for a buyer-seller instruction. Instead he asked the judge to modify the instruction to refer to a "buyer-deliverer" relation. The evidence showed that Henderson was a middleman, receiving drugs from some members of the conspiracy and passing them on to others. That is a conspiratorial relation, see *United States v. Cruse*, 805 F.3d 795, 816 (7th Cir. 2015), so the district judge sensibly declined to give the modified instruction.

On appeal Henderson abandons his request for a "buyer-deliverer" instruction and contends that the judge should have given a standard buyer-seller instruction. Yet [\*4] he did not ask the district judge to do so. True, he asserted that he would be prejudiced if the judge gave such an instruction for some defendants but not others, but he did not contend in the district court (and does not argue on appeal) that the evidence shows him to be similarly situated to anyone who received a buyer-seller

instruction. A judge must match instructions to the evidence and the theory of defense defendant by defendant; there's no rule that all instructions in a single trial must apply to all defendants.

Henderson was a middleman in a conspiratorial chain of distribution, not a buyer for retail sales. Whether or not the evidence might have been parsed to *permit* a buyer-seller instruction, it does not *compel* a district judge to give such an instruction in the absence of an argument at trial that the conditions for giving such an instruction had been met. Henderson stood on a demand for a "buyer-deliverer" instruction, and that request was rightly refused.

Other arguments have been considered but do not require discussion.

AFFIRMED

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End of Document

**APPENDIX B**  
**JUDGMENT OF THE UNITED STATES DISTRICT COURT**  
**FOR THE SOUTHERN DISTRICT OF INDIANA**  
**ENTERED 1-2-18**

UNITED STATES DISTRICT COURT

Southern District of Indiana

UNITED STATES OF AMERICA

v.

ROBERT L. MALONE

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:15CR00019-008  
USM Number: 15253-028

Kyle Edward Cray and James C. McKinley  
Defendant's Attorney

**THE DEFENDANT:**

pleaded guilty to count(s)  
 pleaded nolo contendere to count(s), which was accepted by the court.  
 was found guilty on counts 1 and 2 after a plea of not guilty

The defendant is adjudicated guilty of these offense(s):

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 §§ 841(a)(1), 846, & 851(a)(1)	Conspiracy to Distribute 500 Grams or More of Methamphetamine Mixture	10/15/2015	1
21 §§ 841(a)(1) & 851(a)(1)	Possession with Intent to Distribute 50 Grams or More of Methamphetamine Mixture	05/01/2015	2

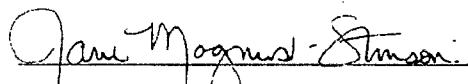
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)  
 Count(s) dismissed on the motion of the United States.

**IT IS ORDERED** that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

12/27/2017

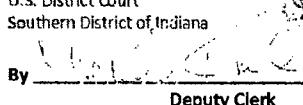
Date of Imposition of Sentence:



Hon. Jane Maghus-Stinson, Chief Judge  
United States District Court  
Southern District of Indiana

**A CERTIFIED TRUE COPY**

Laura A. Briggs, Clerk  
U.S. District Court  
Southern District of Indiana

By   
Deputy Clerk

Date: 1/2/2018

DEFENDANT: Robert L. Malone  
CASE NUMBER: 2:15CR00019-008

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **264 months on each counts 1 & 2, concurrent**.

The Court makes the following recommendations to the Bureau of Prisons: The defendant be designated to the lowest security facility for which he is eligible that is closest to Gary, Indiana

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant was delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

BY: \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Robert L. Malone  
CASE NUMBER: 2:15CR00019-008

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Ct. 1: 10 years, Ct. 2: 8 years, concurrent for a total of 10 years.**

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the conditions listed below.

### CONDITIONS OF SUPERVISION

1. You shall report to the probation office in the judicial district to which you are released within 72 hours of release from the custody of the Bureau of Prisons.
2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. You shall permit a probation officer to visit you at a reasonable time at home or another place where the officer may legitimately enter by right or consent, and shall permit confiscation of any contraband observed in plain view of the probation officer.
4. You shall not knowingly leave the judicial district without the permission of the court or probation officer.
5. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.
6. You shall not meet, communicate, or otherwise interact with a person you know to be engaged, or planning to be engaged, in criminal activity. You shall report any contact with persons you know to be convicted felons to your probation officer within 72 hours of the contact.
7. You shall reside at a location approved by the probation officer and shall notify the probation officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in who lives there, job positions, job responsibilities). When prior notification is not possible, you shall notify the probation officer within 72 hours of the change.
8. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.
9. You shall notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.

DEFENDANT: Robert L. Malone  
CASE NUMBER: 2:15CR00019-008

10. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.
11. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.
12. You shall not use or possess any controlled substances prohibited by applicable state or federal law, unless authorized to do so by a valid prescription from a licensed medical practitioner. You shall follow the prescription instructions regarding frequency and dosage.
13. You shall submit to substance abuse testing to determine if you have used a prohibited substance or to determine compliance with substance abuse treatment. Testing may include no more than 8 drug tests per month. You shall not attempt to obstruct or tamper with the testing methods.
14. You shall not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, Spice, glue, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption.
15. You shall provide the probation officer access to any requested financial information and shall authorize the release of that information to the U.S. Attorney's Office for use in connection with the collection of any outstanding fines and/or restitution.
16. You shall submit to the search by the probation officer of your person, vehicle, office/business, residence, and property, including any computer systems and hardware or software systems, electronic devices, telephones, and Internet-enabled devices, including the data contained in any such items, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving you and that the area(s) to be searched may contain evidence of such violation or conduct. Other law enforcement may assist as necessary. You shall submit to the seizure of contraband found by the probation officer. You shall warn other occupants these locations may be subject to searches.
17. You shall pay the costs associated with the following imposed condition of supervised release, to the extent you are financially able to pay: substance abuse testing. The probation officer shall determine your ability to pay and any schedule of payment.

I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced unreasonably, I may petition the Court for relief or clarification; however, I must comply with the directions of my probation officer unless or until the Court directs otherwise. Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant

Date

U.S. Probation Officer/Designated Witness

Date

DEFENDANT: Robert L. Malone  
CASE NUMBER: 2:15CR00019-008

### CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

<u>Assessment</u>	<u>JVTA Assessment</u> <sup>1</sup>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$200.00	\$1,000.00	

- The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss</u> <sup>2</sup>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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**Totals**

- Restitution amount ordered pursuant to plea agreement \$
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- the interest requirement is waived for the  fine  restitution
- the interest requirement for the  fine  restitution is modified as follows:

<sup>1</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

<sup>2</sup> Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Robert L. Malone  
CASE NUMBER: 2:15CR00019-008

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A  Lump sum payment of \$ \_\_\_\_\_ due immediately, balance due
  - not later than \_\_\_\_\_, or
  - in accordance with  C,  D,  E, or  F below; or
- B  Payment to begin immediately (may be combined with  C,  D,  F or  G below); or
- C  Payment in equal *(e.g., weekly, monthly, quarterly)* installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or
- D  Payment in equal *(e.g., weekly, monthly, quarterly)* installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or
- E  Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F  If this case involves other defendants, each may be held jointly and severally liable for payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.
- G  Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

**APPENDIX C**  
**USDC ORDER RE 21 U.S.C. § 851 FILING**  
**ENTERED 6-30-17**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
TERRE HAUTE DIVISION

UNITED STATES OF AMERICA, )  
*Plaintiff*, )  
vs. ) 2:15-cr-00019-JMS-CMM  
DONTA HENDERSON (05), JUSTIN SWAIN (06), )  
and ROBERT L. MALONE (08), )  
*Defendants*. )

**ORDER**

This Order is prompted by the argument raised in the Government's Motion in Limine Regarding Admissibility of Prior Felony Drug Convictions, filed on June 22, 2017. [[Filing No. 487.](#)] The Court is treating the Sentencing Enhancements set forth in the Second Superseding Indictment, [[Filing No. 407 at 6-7](#)], as the information the Government is required to file pursuant to 21 U.S.C. 851(a)(1).

The Court **ORDERS** that if any Defendant denies or challenges the prior convictions included in the Sentencing Enhancements set forth in the Second Superseding Indictment, they shall file a written response pursuant to 21 U.S.C. § 851(c), setting for the basis therefor, by **July 6, 2017**.

**Distribution via ECF only to all counsel of record**