

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	CRIMINAL NO. 05- 556M (DAR)
	:	
v.	:	
	:	
MARION S. BARRY, JR.,	:	
	:	
Defendant.	:	

GOVERNMENT’S MOTION TO REVOKE PROBATION

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this motion, pursuant to Federal Rule of Criminal Procedure 32.1, to revoke defendant’s probation for his failure to file tax returns for Tax Year 2007, in violation the conditions set for his release.

SUMMARY

The defendant’s failure to his file tax returns for the eighth time in nine years cannot be countenanced. His probation should be revoked, and he should be sentenced to a period of incarceration. In the alternative, the Court should hold a hearing during which the defendant can explain his conduct and during which the government can request a two-year extension of his probation.

BACKGROUND

On October 28, 2005, the defendant pleaded guilty to two crimes: 1) failure to file a federal income tax return in violation of Title 26, United States Code, Section 7203 and 2) failure to make a District of Columbia return in violation of Title 47, District of Columbia Code, Section 4103. The

guilty pleas resulted from the defendant's failure to file his tax returns for the years 1999 through 2004 with either the federal government or the District of Columbia government.

On March 9, 2006, the Court held a sentencing hearing. Before imposing sentence the Court heard from the defendant, who addressed the Court in person and said, in part:

There is no excuse and no reason that anyone ought to be able to give as to why you do not file and pay the appropriate federal and District taxes. And therefore I will not try to even attempt to make an excuse or a reason.

I take full responsibility for that action, Your Honor. (Sent. Tr. 17-18.)

The Court imposed a sentence of three years of probation. The first condition of probation in the Judgment and Commitment Order states: "While on probation, the defendant shall not commit another federal, state, or local crime." In addition, the Court imposed a special condition of probation that the defendant "[c]omply with directives of the federal and local tax authorities regarding payment of taxes, penalties and interest."

On February 1, 2007, the government filed a motion to revoke the defendant's probation because he had failed to file his tax returns for Tax Year 2005 with either the federal government or the District of Columbia. On June 21, 2007, the Court denied the government's motion, holding that there was insufficient proof that the defendant willfully failed to file his returns.

In its report of August 26, 2008, the probation office informed the Court that the defendant wanted permission to take a personal vacation in Jamaica during September 2008. The office also informed the Court that the defendant had "recently submitted documentation of his application for an extension of time to file his 2007 tax return."

In its report of January 29, 2009, the probation office notified the Court that the defendant had yet to file his tax returns with the federal government and the District of Columbia for Tax Year 2007. The report disclosed that the defendant had filed for an extension of time to file until October 2008, but had not filed on that date. On November 25, 2008, the defendant promised the probation office that he would file his tax returns within two weeks, but he did not do so. When the defendant still had not filed his tax returns by January 13, 2009, the probation office wrote a letter to the defendant requiring that he “provide documentation” by February 8, 2009, that he had filed his tax returns.

Unless extended, the defendant’s probation will terminate on March 8, 2009, despite the fact that he has failed to file on time his federal and District taxes for two out of the three years he was on probation for the crime of failure to file his taxes.

ARGUMENT

The defendant’s conduct regarding Tax Year 2007 is indefensible. Yet again, he comes before the Court for failure to file his tax returns on time as required both by the laws of the federal government and the District of Columbia. This means that the defendant has failed to file his tax returns on time for eight of the last nine years. The defendant initially failed to file his tax returns for the years 1999, 2000, 2001, 2002, 2003, and 2004. For this conduct, the defendant was convicted of one count of failure to file a federal return and one count of failure to file a return with the District of Columbia. Immediately after being placed on probation, the defendant failed to file his tax returns for year 2005. Although the Court denied the government’s motion to revoke probation at that time, the defendant was present in the courtroom for the entire proceeding. He heard the arguments of the

government regarding the requirement that he file his taxes on time. Subsequent to the revocation hearing, the defendant filed his tax returns for year 2006.

The reports of the probation office demonstrate that the defendant was well aware of his duty to file his 2007 tax returns. In fact, just prior to his request for Court approval to travel outside the United States to take a personal vacation in Jamaica during September 2008, the defendant provided documentation that he had filed an extension of time to file until October 2008. He knew that permission to travel hinged on his compliance with the tax laws. Although he took his personal vacation in September, the defendant did not file his tax returns in October as required. Similarly, when the probation office asked about this continuing failure to file his tax returns on November 25, 2008, the defendant stated that he would file his returns within two weeks. Instead, the defendant again failed to file as he had promised, and as he was required, to do.

On January 13, 2009, the probation office wrote to the defendant requesting “documentation” that he had filed. By that time, the defendant was nearly four months beyond the extension he had been granted to file his tax returns in October 2008. In addition, he was five weeks beyond the time he had promised the probation office that he would file his tax returns on November 25, 2008. Still, the defendant had not filed his tax returns.

It is ludicrous for the defendant to argue, as he did at his sentencing, that his failure to file taxes is a “personal matter.”¹ The tax filing status of a public servant is a matter of legitimate public interest. It is not acceptable for any citizen to shirk a basic civil duty, let alone a former Mayor and a current City Councilman who has been responsible in the past and continues to be responsible for spending public funds collected from District of Columbia taxpayers. In this case, however, the

¹ Sent. Tr. 18.

defendant engaged in conduct beyond that of failing to pay his taxes. In this case, the defendant has failed **even to file** his tax returns. In the defendant's own words, there is "no excuse and no reason" for failure to file his tax returns as required.²

The defendant's failure to file his 2007 tax returns violates the express condition of his probation that he "[c]omply with directives of the federal and local tax authorities regarding payment of taxes, penalties and interest." In addition, his failure to file tax returns constitutes a new violation of federal and District of Columbia laws requiring that he file his returns. Not only is each failure to file a separate crime, but each is exactly the same crime as one for which he was placed on probation in the first place and for which a motion to revoke probation was filed previously.

At the time of his sentencing, the defendant faced an advisory sentencing guideline range of 12 to 18 months of imprisonment, based on an offense level of 12 and a criminal history category of II. Expecting that the defendant would act swiftly to correct his tax delinquencies and comply with the law, the government agreed to take no position on defendant's request for a probationary sentence outside the advisory guideline range. Bound by its plea agreement, the government abided by this limitation on its allocution, even in the face of troubling indications that the defendant was failing to act with dispatch to satisfy his obligations. When the defendant asked the Court for a sentence of probation in order to prove that he had amended his conduct, the Court agreed.

The Court's patience should be at an end. The defendant continues to flout the standards applicable to all persons who reside in the District of Columbia, who work for a living, and who pay a portion of their income to support his salary. In addition, the defendant has wasted the time

² Sent. Tr. 17-18.

of this Court, the probation office, and the government by his recalcitrance to file the tax returns required of every citizen. By adding yet an eighth year to his record of willfully failing to file tax returns (while serving a federal probationary sentence for that very crime), the defendant exposes his unworthiness to reap the benefits of a lenient sanction.³

THE ALTERNATIVE REQUEST

In the alternative to revocation, the government requests that the Court hold a hearing during which the defendant can address the Court about his conduct. This Court deserves an explanation from the defendant himself about why he has broken his promise to the Court to obey the conditions of his release and the tax laws of the federal government and the District of Columbia. The defendant previously told the Court that there was “no excuse and no reason” for failure to file his tax returns. It is time that he explain why he has not done so.⁴

At the hearing, the government will request that the Court extend his probation for two years as authorized by Fed. R. Crim. Pro. 32.1(c). This extension is necessary in order to ensure that the defendant has learned to obey the conditions of release and the requirements of the tax laws.

³ In its report of January 29, 2009, the probation office also notified the Court that the defendant may have a medical issue to resolve in the next few weeks. The government does not oppose coordinating the period of incarceration so that the defendant can resolve medical issues, if necessary.

⁴ Although it is not a basis cited by the government for revocation, the defendant also should explain why he is behind on his tax payment agreement with the District of Columbia.

WHEREFORE, the government respectfully requests that the Court issue the proposed Summons, which is attached, in order to schedule a hearing regarding revocation of the defendant's probation.

Respectfully submitted,

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**SUMMONS
FOR HEARING TO REVOKE PROBATION**

This matter comes before the Court upon the Government’s Motion to Revoke Probation. Based upon the information contained in the government’s motion, the Court has determined to hold a revocation hearing pursuant to Fed. R. Crim. P. 32.1. Accordingly, it is this _____ day of February, 2009

ORDERED that the defendant shall appear before the Court for a revocation hearing on the _____ day of _____, 2009, at _____.

IT IS FURTHER ORDERED that the alleged violations of probation that will be the subject of the hearing are: 1) the failure to file a federal tax return on time for Tax Year 2007; and 2) the failure to file a District of Columbia tax return on time for Tax Year 2007.

DEBORAH A. ROBINSON
United States Magistrate Judge