

**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 PREHEARING MEMORANDUM
REGARDING DEFENDANT’S
FAILURE TO PROVIDE INFORMATION TO THE PROBATION OFFICE
AND
FAILURE TO FILE TAX RETURNS**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this memorandum regarding the defendant’s failure to provide information to the probation office as requested and his failure to file tax returns.

SUMMARY

The Summons alleges the defendant failed to verify to the Probation Office by February 8, 2009, that he had filed his 2007 federal tax return and that he was paying his outstanding tax obligations.¹ It was a material failure for the defendant not to provide this verification to the Probation Office by February 8, 2009, because, as of that date, he still had not filed his 2007 tax

¹ The Summons alleges, in pertinent part:
“the failure to comply with the request to provide verification of the defendant’s 2007 federal income tax return and proof of payments toward his previous outstanding tax obligations to the federal and the District of Columbia governments by the deadline of February 8, 2009, a date that had been established by the Probation Office.”

returns and he was not current in paying his tax obligation to the District of Columbia. In fact, as of February 8, 2009, the defendant had not made a tax payment to the District of Columbia for more than six months.

The Summons also alleges that the defendant failed to file his federal and District of Columbia tax returns on time for tax year 2007. Because there is no intent requirement applicable to revocation of probation as there is for criminal conviction, the defendant's probation should be revoked unless the evidence shows that it was beyond his control to file his tax returns. Given the many activities in which the defendant engaged instead of filing his tax returns, it was not beyond his power to file his tax returns on time.

ADDITIONAL BACKGROUND

1. After pleading guilty in this case, the defendant agreed to make monthly payments to the District government to reduce his outstanding tax obligation. Although the defendant did not make a payment every month as promised, he had a tiny positive balance when he made a payment on July 3, 2008. As of February 8, 2009, however, the defendant had not made a payment to the District of Columbia since that time. (Exhibit 1.)²

2. After pleading guilty in this case, the defendant did not reach an agreement with the Internal Revenue Service (IRS) for a repayment schedule of his outstanding tax obligation. Because the IRS garnished the defendant's wages, monthly payments were being made to the federal government as of February 8, 2009. (Exhibit 2.)

² Details are provided in the Affidavits of Special Agents William Randolph (filed under seal pursuant to District of Columbia law) and Don Sender as Exhibits 1 and 2, respectively.

3. The defendant concedes that, prior to February 8, 2009, he had not filed his federal tax return for tax year 2007. When he finally filed his tax return to the federal government for that year on February 17, 2009, the defendant owed unpaid taxes. (Exhibit 2.) In addition, the defendant concedes he had not filed his District of Columbia tax return for 2007 by February 8, 2009. When he finally filed his tax return for the District of Columbia for tax year 2007 on February 13, 2009, he owed unpaid taxes. (Exhibit 1.)

ARGUMENT

The defendant is on probation for failure to file his District of Columbia and his federal tax returns. Given the amounts that he owes to both governments for outstanding tax obligations, the defendant should have been scrupulous in making his monthly payments. Instead, the defendant stopped making payments to the District of Columbia after July 3, 2008. By February 8, 2009, he had gone more than six months without paying even one dollar to the District of Columbia government. There is no excuse for the defendant's failure to make payments to the District of Columbia because, during this six-month period, the defendant nevertheless had enough time and money, for instance, to take a six-day vacation in Jamaica in September 2008 as well as to run for re-election as a Councilmember.

When the Probation Office asked him on January 13, 2009, to verify that he had filed his federal tax return and was repaying taxes to the District of Columbia and the federal government, the defendant should have provided this information immediately, let alone during the three weeks given him by the deadline of February 8, 2009. Yet he did not provide any information. It was only after the government filed its motion for revocation of probation on February 9, 2009, and the Probation Office requested a hearing on violation on February 10, 2009, that the defendant filed his

tax returns with the federal and District of Columbia governments. Similarly, it was only after motions by the government and the Probation Office that he renewed his repayment schedule with the District of Columbia.

In United States v. Warner, 830 F.2d 651 (7th Cir. 1987), the Seventh Circuit considered a revocation of probation where the defendant had been convicted of failure to file tax returns but had failed to file returns while on probation for various reasons including Fifth Amendment concerns. The Circuit Court flatly rejected that defendant's claim that his probation should not be revoked.

Defendant next contends that the district court could not reasonably find that his failure to file his returns was willful; to the contrary, urges defendant, his failure to file the returns and satisfy his probation conditions arose from questions about which forms to fill out and his good-faith belief that he could invoke the Fifth Amendment. In addition, defendant contends, as he had at trial, that his records had disappeared, rendering him unable to complete his returns. We reject this contention.

First, there is no intent or fault element required by the probation conditions as imposed by the sentencing court here. Nothing in the conditions can be read as requiring a special mental state before they are breached. While proving willfulness was necessary to obtain defendant's conviction under 26 U.S.C. § 7203, to prove a probation violation the government needed to show only the fact that defendant did not file the returns. Id. at 656.

The Circuit went on to state: "Defendant showed by failing to file his returns, without more, that he was not a promising candidate for rehabilitation." Id. at 657. In fact, the Circuit held that failure to file the tax returns would only be excused if it was "beyond his control and did not implicate the reasons why the sentencing court imposed probation." Id.

The defendant in this case has shown that he is not a good candidate for probation. Eight times in the past nine years, the defendant has failed to file his tax returns on time. Two of those times occurred while the defendant was on probation. In each of those instances, the defendant filed his returns only after the government filed motions to revoke. The defendant's claim that he was so distracted by his illness that he could not file his tax returns between October 2008 and February 2009, is thoroughly unconvincing. During that time he was, among other things, a candidate for election and an active Councilmember assigned to the Committee on Finance and Revenue. Even more probative of his ability to file is the fact that, once the motion to revoke and the motion for a hearing on violation were filed, the defendant's illness did not prevent him from filing his tax returns immediately even though his operation was less than two weeks away.

During his probation, the defendant continually flouted 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 of this Court, the probation office, and the government by his recalcitrance to file the tax returns required of every citizen. The

defendant has proven his unworthiness to reap the benefits of probation. The defendant's probation should be revoked. He should be sentenced to some period of incarceration, such as weekends or community confinement. In the alternative, a two-year extension of his probation should be imposed.

Respectfully submitted,
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