

CC TO JUDGE pm

HON. THOMAS S. ZILLY

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AT SEATTLE  
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WESTERN DISTRICT OF WASHINGTON

JUN 21 2001

BY

DEPUTY

**UNITED STATES ATTORNEY  
SEATTLE, WASHINGTON**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

NO. CR94-549Z

Plaintiff,

DEFENDANT'S MEMORANDUM

- v -

OF LAW IN SUPPORT OF

MICHAEL NORMAN KATZ,

THE MOTION TO DISMISS

Defendant.

ALLEGED VIOLATIONS

----- x

I.

INTRODUCTION

This memorandum is submitted in support of the defendant's motion to dismiss the four supervised release violation charges now pending against him. The motion to dismiss is noted for June 29, 2001.<sup>1</sup>

<sup>1</sup> Although legal defects in violation notices are often argued in the course of the revocation hearing itself, there is no reason to wait for the hearing in this case. The violations are insufficient as a matter of law. Thus, they should be dismissed. See United States v. Sanchez, 225 F.3d 172 (2d Cir. 2000) (affirming the denial of a pre-hearing motion to dismiss violation charges, but raising no question as to the procedural propriety of such a motion).

DEFENDANT'S MEMORANDUM OF LAW  
IN SUPPORT OF THE MOTION TO DISMISS  
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ffices of  
Bentley  
rde, June 2220  
ston 98101-3207  
143-9391

1 An initial appearance in this matter is scheduled  
2 for August 3, 2001 at 9:00 a.m. Mr. Katz will appear at that  
3 time pursuant to a summons. An evidentiary hearing in the  
4 case is scheduled to follow immediately thereafter.

5 II.

6 STATEMENT OF FACTS

7 Michael Norman Katz entered a plea of guilty to two  
8 counts in the indictment, Counts 3 and 5, in October 1997.  
9 He was sentenced to a term of incarceration; he served his  
10 sentence; and he began a term of three years' supervised  
11 release on May 18, 1998.

12 At the time of sentencing, Mr. Katz lived in Plano,  
13 a Dallas suburb located in the Eastern District of Texas.  
14 Based on policies established by the Administrative Office of  
15 United States Courts, it appears that arrangements were made,  
16 at an early point, to transfer supervision of Mr. Katz to the  
17 Eastern District of Texas, following his release from  
18 confinement. See Guide to Judiciary Policies and Procedures,  
19 Vol. X, Ch. IV, Part B, §9(a) ("Supervision should be  
20 transferred immediately after sentencing if the offender has  
21 legal residence in another district"). Although jurisdiction  
22 over Mr. Katz could have been transferred to the Eastern  
23 District of Texas, if a request had been made and that  
24 District had consented, see 18 U.S.C. §3605, that step was

25  
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1 not taken. Jurisdiction remained with the United States  
2 District Court for the Western District of Washington.

3 Mr. Katz' supervised release began on May 18, 1998.  
4 At all times thereafter, he was supervised by officers in the  
5 Eastern District of Texas. His first probation officer was  
6 Ms. Frances Vasquez. Subsequently, Ms. Vasquez was replaced  
7 by Mr. Billy Johnson. Mr. Katz' monthly restitution payments  
8 were set at \$100. He consistently made that payment. He  
9 filed all the required monthly reports. He obtained  
10 employment. He was not in any kind of trouble with the law.

11 There was one problem in Mr. Katz' performance  
12 while under supervision. This was his purchase of a Mercedes  
13 Benz automobile in February 1999 and his filing of a monthly  
14 supervision report that did not list the purchase. Mr. Katz  
15 discussed the issue with Ms. Vasquez and felt that he had  
16 resolved the issue through a written apology in April 1999  
17 (Exhibit D to the accompanying declaration of Mr. Katz).

18 A year later, Ms. Vasquez brought the matter to the  
19 attention of Judge Zilly in a letter, dated May 22, 2000  
20 (Exhibit A to the accompanying declaration of Mr. Katz). The  
21 letter was written in opposition to Mr. Katz's request to be  
22 relieved of the requirement that he obtain permission for  
23 travel outside the Eastern District of Texas. However, the  
24 letter also informed the court of the vehicle purchase and  
25 Mr. Katz' lapse in promptly reporting it:

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1 During April 1999, the Probation Office learned  
2 that Mr. Katz had purchased a 1999 Mercedes Benz  
3 utility vehicle. He had not reported this on his  
4 monthly report. He later indicated that his  
5 failure to report this information was simply an  
6 oversight.

7 Although Ms. Vasquez felt that "Mr. Katz has not  
8 cooperated with the probation office in complying with his  
9 outstanding restitution obligation," she did not recommend  
10 violation proceedings. Instead, she recommended closely  
11 scrutinizing Mr. Katz' travel requests.

12 In short, no violation action was taken with  
13 respect to the purchase of the vehicle in 1999, and the  
14 probation office did not tell Mr. Katz to increase his  
15 restitution payments, or recommend that he be violated,  
16 despite the concerns that were expressed in the May 22, 2000  
17 letter to the court. Now, at the very end of his supervised  
18 release term, Mr. Katz is charged with violations, all of  
19 which stem from a situation that the probation office has  
20 known about for years.

21 **III.**

22 **DISCUSSION**

23 **A. The Alleged Violations Relating to the 1999**  
24 **Purchase of the Mercedes Benz Have Become**  
25 **Stale or Are Waived as a Basis for Revoking**  
26 **Supervised Release.**

Assuming that the Probation Office in the Western  
District of Washington has authority to recommend the  
initiation of violation proceedings without the endorsement

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1 of the Eastern District of Texas,<sup>2</sup> the violations in this  
2 matter are too late.

3 Fairness -- indeed, due process -- require that  
4 when an offender's misconduct could be the basis for a  
5 violation, the probation officer should initiate a violation  
6 charge promptly and not "save it up" for the very end of the  
7 supervised release term.<sup>3</sup>

8  
9 <sup>2</sup> Supervision of Mr. Katz was transferred to the  
10 Eastern District of Texas at the outset. Mr. Katz was  
11 supervised by Texas throughout the three-year term of his  
12 supervised release. Supervision was never transferred back  
13 to Seattle.

14 When an individual is on federal supervised  
15 release, and his supervised release is being supervised in  
16 another district, the decision on whether or not to recommend  
17 judicial action for alleged violations of supervised release  
18 should be in the hands of the supervising district. The  
19 supervising district has a better "feel" for an offender's  
20 progress while under supervision than does the probation  
21 office in a district which has had no contact with the  
22 defendant during the years since he was sentenced.

23 <sup>3</sup> The prompt reporting of potential violations is  
24 required by statute as well. A federal probation officer is  
25 required under 18 U.S.C. §3603(7) to

26 keep informed concerning the conduct, condition, and  
compliance with any condition of probation, including  
the payment of a fine or restitution of each probationer  
under his supervision and report thereon to the court  
placing such person on probation

and, under 18 U.S.C. §3603(8)(B), to

immediately report any violation of the conditions of  
release to the court and the Attorney General or his  
designee ...

Cf. United States Sentencing Guidelines, §7B1.2(b).

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29 ALLEGED VIOLATIONS - 5

1 This case is controlled by United States v.  
2 Hamilton, 708 F.2d 1412 (9th Cir. 1983), and a careful review  
3 of the facts in Hamilton is warranted. Hamilton was  
4 convicted of conspiring to sell checks stolen from a bank.  
5 He pled guilty and was placed on probation. As part of his  
6 probation, Hamilton was required to serve 120 days in a jail-  
7 type setting, on weekends. Hamilton served 49 out of the 60  
8 required weekends, but he neglected to serve the remaining  
9 11. Hamilton's original probation officer was nonchalant  
10 about this discrepancy. After four years of probation,  
11 however, Hamilton's probation officer was changed. The new  
12 officer imposed much stricter conditions. When Hamilton  
13 failed to appear for a meeting with the officer, the officer  
14 filed violation charges based on (1) Hamilton's failure to  
15 serve all of the weekends, (2) Hamilton's failure to report  
16 for the meeting, (3) Hamilton's failure to appear in court,  
17 and (4) Hamilton's failure to be lawfully employed. The  
18 district court found that Hamilton had violated and revoked  
19 his probation.

20 On appeal, the Ninth Circuit found that the trial  
21 court had abused its discretion in revoking Hamilton's  
22 probation. The court noted that "[t]here [was] no evidence  
23 in the record that [Hamilton] was ever admonished for not  
24 completing his jail term. Indeed, the record below suggests  
25 that Hamilton's [original] probation officer did not consider

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1 his default to be a notable or serious breach of his  
2 probation conditions." 709 F.2d at 1413-14. The Ninth  
3 Circuit observed that while revocation proceedings should not  
4 be filed automatically or merely because they might  
5 technically be justified, "[a]t some point ... violations of  
6 which the district court has been apprised and upon which the  
7 probationer has sought corrective action become stale or are  
8 waived as a basis for revoking probation." 709 F.2d at 1415  
9 (emphasis added).

10 The Ninth Circuit was also concerned over the fact  
11 that the supervisory approach utilized in Hamilton's case had  
12 changed dramatically, without notice to the offender.  
13 Hamilton's initial probation officer had been "far from  
14 rigorous" in supervising him, whereas his new officer  
15 suddenly "expected him to conform to a far more rigorous  
16 reporting regimen." 709 F.2d at 1415. The court concluded:

17 The interests of fairness require some level of  
18 consistency in the supervision of a probationer. If a  
19 newly assigned probation officer intends to enforce  
20 probation conditions more stringently than his  
21 predecessor, the probationer must be advised of that  
22 policy before its violation can become the basis for  
23 revocation.

24 709 F.2d at 1415.

25 The application of Hamilton in this case is clear.  
26 A "new" probation officer, Mr. Sanders of the Western  
District of Washington, enters the case. Mr. Sanders  
disagrees with the decision to permit Mr. Katz to pay

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1 restitution at \$100 per month. He issues a notice of  
2 violation (Violation No. 1), charging Mr. Katz with violating  
3 the restitution condition. Why? Because he paid only the  
4 repayment amount set by the probation office in Texas!

5 The purchase of the Mercedes, the failure to  
6 disclose the purchase of the Mercedes, and the failure to pay  
7 more than \$100 per month in restitution -- the Texas  
8 probation office was well aware of all these matters. Here,  
9 as in Hamilton, "there is nothing in the record to indicate  
10 that [the defendant] engaged in any sort of antisocial or  
11 opprobrious conduct for which revocation should be imposed."  
12 709 F.2d at 1415. Here, as in Hamilton, the defendant was  
13 suddenly and without warning subjected to a far tougher  
14 supervision regimen. Here, as in Hamilton, revocation of  
15 supervised release would be an abuse of discretion.

16 **B. Mr. Katz May Not be Incarcerated for Failing**  
17 **to Pay the Full Amount of his Restitution**  
18 **Obligation as Set Forth in the Judgment.**

19 Mr. Katz paid \$100 a month toward his restitution  
20 obligation throughout his term of supervised release. Ms.  
21 Vasquez and Mr. Johnson decided that this amount was  
22 appropriate or at least acceptable. Their judgment should  
23 not be second-guessed at this late date.

24 Violating Mr. Katz on the basis of Violation No. 1  
25 would implicate substantial due process concerns. In United  
26 States v. Simmons, 812 F.2d 561, 565 (9th Cir. 1987), the

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1 court highlighted these concerns. In Simmons, the defendant  
2 convicted of threatening the President had been placed on  
3 probation, with a special condition that he obtain mental  
4 health treatment at an institution of his own choosing. He  
5 chose a VA hospital. He entered the VA hospital, but after a  
6 few days he refused to cooperate with the staff and said that  
7 he wanted to transfer to another facility. The district  
8 court found that he had violated the terms of probation by  
9 refusing to cooperate with the treatment program at the VA  
10 facility; he revoked probation and sentenced Simmons to five  
11 years' incarceration.

12 The Ninth Circuit reversed, noting "the decision to  
13 revoke ... probation should not be undertaken lightly," 812  
14 F.2d at 567, and concluding that Simmons had not been  
15 adequately informed that if he refused treatment he would be  
16 in violation of the terms of probation.

17 The facts here are similar. Just as Simmons did  
18 what he thought he was supposed to do (enter and remain at a  
19 mental health facility of his choosing), so Mr. Katz did what  
20 he thought he was supposed to do (pay \$100 per month toward a  
21 significantly disputed<sup>4</sup> restitution total). Katz was never  
22 told that his failure to pay more would be the basis for

23 \_\_\_\_\_  
24 <sup>4</sup> See, e.g., Exhibits B and C to the accompanying  
25 Declaration of Michael Katz.

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1 violation proceedings. Violation No. 1 is therefore  
2 untenable.<sup>5</sup>

3 Finally, a violation of supervised release cannot  
4 be grounded simply on the defendant's failure to satisfy  
5 financial obligations. Breardon v. Georgia, 461 U.S. 660  
6 (1983).

7 **C. Mr. Sanders Did Not Have Authority to Require**  
8 **Katz to Sign a Release for the Car Financing**  
9 **Records, and Katz was Not Aware that He Could**  
10 **be Violated if He Did Not Sign Such a Release.**

11 Violation No. 2 is based on Mr. Katz' alleged  
12 failure to provide the probation office with access to  
13 requested financial information on May 15, 2001. The  
14 information was a release of records that Mr. Sanders sought.

15 Mr. Katz was being supervised in Texas. He was not  
16 being supervised in Washington. Certainly, if an individual  
17 is under federal supervision, he is not required to comply  
18 with the requests of any federal probation officer. He must  
19 comply with the requests of the officer who is supervising  
20 him, or in some instances, with the requests of other  
21 officers in the supervising district. Mr. Sanders was not

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22 <sup>5</sup> We note that Mr. Katz' restitution obligation -- to  
23 the extent that the \$1.925 million total is not fully offset  
24 by amounts recovered by the victims -- will continue, even if  
25 the court grants our motion to dismiss. The Financial  
Liability Unit at the United States Attorney's Office will  
take over the collection effort. That office is experienced  
and tenacious. In other words, by granting the present  
motion, the court would not be relieving Mr. Katz of further  
financial obligations in this case.

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1 supervising Mr. Katz. Accordingly, Violation No. 2 should be  
2 dismissed.

3 Moreover, Mr. Katz' refusal to comply was not  
4 intentional or willful. It is well established that "the  
5 loss of liberty entailed in the revocation of probation is a  
6 serious deprivation requiring the district court to accord  
7 due process to the probationer," United States v. Simmons,  
8 supra, 812 F.2d at 565, and that "[a]n essential component of  
9 these due process rights is that individuals be given fair  
10 warning of acts which may lead to revocation," Ibid.

11 Mr. Katz' refusal to sign a release was not  
12 criminal. Unless he received prior warning that his refusal  
13 could lead to revocation, to violate him on this basis would  
14 be an abuse of discretion. United States v. Simmons, supra.

15 **E. Violation No. 4 Was Filed Too Late.**

16 It is clear that for violation proceedings to be  
17 timely, a warrant or summons must be issued before the term  
18 of supervised release has expired. United States v. Morales-  
19 Alejo, 193 F.3d 1102 (9th Cir. 1999).

20 Violation No. 4 was officially approved by the  
21 district court (Zilly, J.) on May 18, 2001. Mr. Katz' term  
22 of supervised release expired the day before, May 17, 2001.  
23 If Violation Nos. 1, 2 and 3 had not been initiated by the  
24 action of Judge Rothstein on May 16th, Violation No. 4 would  
25 clearly have been untimely. There is nothing in the statute,

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1 18 U.S.C. §3583(i), or in the caselaw, see Morales-Alejo,  
2 supra, to justify a different result merely because other  
3 violations may have been filed on a timely, if last-minute,  
4 basis.<sup>6</sup> Moreover, as Mr. Katz states in his declaration, due  
5 process precludes proceeding on Violation No. 4 because a  
6 crucial witness cannot be located. See generally, United  
7 States v. Sanchez, 225 F.3d 172 (2d Cir. 2000) (four-year  
8 delay in adjudicating a violation charge did not violate due  
9 process, where the violation was based on a criminal  
10 conviction and defendant could not show prejudice).

11 IV.

12 CONCLUSION

13 The violation allegations should be dismissed and  
14 Mr. Katz should be discharged.

15 DATED this 21<sup>st</sup> day of June, 2001.

16 Respectfully submitted,

17 LAW OFFICES OF ALLEN R. BENTLEY

18 By: Allen R. Bentley  
19 ALLEN R. BENTLEY  
20 WSBA No. 12275  
21 Attorney for Defendant  
Michael Norman Katz

22 <sup>6</sup> Violation No. 4 was signed by Magistrate Judge  
23 Benton on May 17, 2001, the last day on which a technically  
24 timely violation could have been issued. However, we  
25 question the authority of a Magistrate Judge to take action  
of this kind. See generally, 28 U.S.C. §636; Magistrate  
Judges' Rules, Western District of Washington, Rule 1(b).

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