

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 08-60099-CR-ZLOCH

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRADLEY BIRKENFELD,

Defendant.

**BRADLEY BIRKENFELD'S MOTION FOR TERMINATION
OF SUPERVISED RELEASE OR, IN THE ALTERNATIVE, MODIFICATION OF
CONDITIONS**

Pursuant to 18 U.S. Code § 3583(e), Defendant Bradley Birkenfeld respectfully files this Motion for Termination of Supervised Release, or, In the Alternative, Modification of Conditions.

Introduction

It has been widely reported and recognized that Bradley Birkenfeld has provided the United States with a level of cooperation unprecedented in its impact. Based on extensive information that Mr. Birkenfeld offered voluntarily and at great personal risk, the government was able to bring multiple prosecutions related to the practices of his former employer, UBS, and to enter into agreements that have put an end to a practice of tax evasion and unlawful secrecy by Swiss banks and their clients looking to avoid paying American taxes.

It is also abundantly clear that Mr. Birkenfeld has been punished severely. Even after receiving a 5K1.1 reduction based on cooperation, Mr. Birkenfeld has served over 30 months in

prison as well as twenty months in pre-sentence home confinement, one month in community confinement, three months in post-prison home confinement, and another two years of supervised release.

Having complied with the conditions imposed by the Court, Mr. Birkenfeld now seeks to terminate his supervised release less than one year early or, in the alternative, to modify the conditions of release. The reason is simple: as the end of his sentence approaches, Mr. Birkenfeld, who now resides in New Hampshire, seeks to return to Europe to rebuild his life. He therefore needs the ability to travel and relocate as necessary in order establish a new home so that he can once again be a productive member of society. Accordingly, he asks the Court to use its broad discretion to grant the relief sought herein.

Background

In 2007, Mr. Birkenfeld voluntarily approached law enforcement and began providing the United States government with extensive and detailed information about a tax fraud scheme committed by UBS and its top executives designed to help clients conceal their assets and avoid paying taxes owed to the United States. As a direct effect of Mr. Birkenfeld's cooperation, the government filed an action that ultimately resulted in the termination of UBS's illicit business in the United States; UBS's payment of a \$780 million fine; a comprehensive new tax treaty between the United States and Switzerland; the establishment of three IRS amnesty programs through which the United States has collected billions of dollars from approximately 45,000 American citizens banking offshore; and a formal apology from UBS to the United States government. It also led to numerous federal criminal prosecutions of individuals involved in UBS's offenses. Mr. Birkenfeld's cooperation was recognized not only by the prosecutors at his sentencing, but by the Chairman of the Permanent Subcommittee on Investigations of the United

States Senate, the Director of the Division of Enforcement for the Securities and Exchange Commission, and others. (D.E. #77-4, 78-1, 82).

Although Mr. Birkenfeld began providing information to the government voluntarily and before any charges were filed, he was eventually charged and pled guilty to one count of violating 18 U.S.C. § 371 on June 19, 2008. (DE # 37, 39, 40). Of relevance for this motion, it bears noting that both the plea agreement and the plea colloquy stated that, following any sentence of imprisonment, Mr. Birkenfeld faced a maximum of *two years* of supervised release. (DE #77-3, p. 13, ll.15-16).

Following multiple extensions requested by the Department of Justice based in part on his continuing cooperation for more than a year, Mr. Birkenfeld appeared before the Court for sentencing on August 26, 2009. From the time of his initial appearance in May 2008 until the day of sentencing, Mr. Birkenfeld was on bond and fully complied with all restrictions and conditions, including evening home confinement with electronic monitoring. (DE #19).

At sentencing, this Court ordered that Mr. Birkenfeld serve 40 month in prison, pay a fine of \$30,000.00, and serve three years of supervised release. (DE #81). After voluntarily reporting to his designated facility and then serving over 30 months in prison, one month in community confinement, and three months in home confinement, Mr. Birkenfeld was placed on supervised release on November 29, 2012. Because Mr. Birkenfeld moved to New Hampshire following his release, he has at all times been supervised by the United States Probation Office for the District of New Hampshire. In addition to serving his time in prison, Mr. Birkenfeld has fully paid his fine and he has served more than two years of his three-year term of supervised release, which is set to expire on November 28, 2015.

Mr. Birkenfeld has complied with the terms of supervised release and has indeed proven

to be a positive and extremely generous member of society. By way of example, his charitable deeds have included purchasing and providing six electric bicycles to the Boston Police Department to help law enforcement following the 2013 Boston Marathon bombings and donating significant amounts of money and a luxury suite to the Boston Bruins Foundation to assist its mission of helping children in need. *See* Exhibit A (letters and photos regarding charitable deeds).

The sole blemish in Mr. Birkenfeld's otherwise exemplary compliance with the terms of supervised release was a 2013 arrest and subsequent conviction for driving while intoxicated in Portsmouth, New Hampshire. Mr. Birkenfeld acknowledged having two alcoholic beverages at dinner with friends but never believed he was intoxicated. As a result of this violation, Mr. Birkenfeld was ordered to surrender his driver's license for six months, and the conviction is presently under appeal in New Hampshire. Quite significantly, the United States Probation Officer supervising Mr. Birkenfeld recommended that no action be taken as a result of this incident. As explained in a memorandum to the probation office for this Court: "Up until this incident, Birkenfeld had been fully compliant with all of the conditions of his supervised release and his most recent PCRA revealed him to be a low risk for recidivism. Continued personal contact and home visits, as well as continued collateral contact with the Portsmouth District Court probation department will be used to ensure that he remains in compliance." *See* Exhibit B (Memorandum from Kate Mattei, USPO). The Probation Officer's trust was well-placed, as Mr. Birkenfeld has been fully compliant with all conditions of his release since that time.

Discussion

Following completion of his sentence, Mr. Birkenfeld plans to return to Europe, where he resided from 1995 until 2008, when he voluntarily came to the United States as part of his

cooperation with the government in this case. Having completed more than two years of supervised release, Mr. Birkenfeld asks the Court to allow him to begin the process of rebuilding his life, which will require international travel in order to establish a new home and develop the contacts necessary to become once again a productive member of society. Due to the notoriety surrounding the thousands of previously-secret UBS cases that have been exposed, Mr. Birkenfeld knows that this will not be easy. He therefore seeks permission to start now. This will require terminating his supervised release or, in the alternative, modifying the conditions of release to allow him to accomplish his worthy objectives.

Title 18, Section 3583 of the United States Code gives this Court the authority to “terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . if it is satisfied that such action is warrant by the conduct of the defendant released and the interest of justice.” 18 U.S.C. § 3583(e)(1). The Court also has the authority to “modify [or] reduce . . . the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release.” 18 U.S.C. § 3583(e)(2). In making such decisions, Courts should consider the sentencing factors set forth in 18 U.S.C. § 3553.

The Court has broad discretion to grant relief under Section 3583, *see, e.g., United States v. McClamma*, 548 F. Appx. 598, 599 (11th Cir. 2013), and there are sound policy reasons supporting early termination for compliant offenders. Indeed, analysis conducted by the Judicial Conference of the United States found that early termination of supervision for appropriate individuals is an effective way to save costs without jeopardizing public safety. *See* Composite Exhibit C (Memorandum from Committee on Criminal Law, Judicial Conference of the United States, “Cost-Containment Strategies Related to Probation and Pretrial Services Offices,” p.2;

United States Courts, *Early Termination of Supervision Cost-Effective and Safe*, <http://news.uscourts.gov/early-termination-supervision-cost-effective-and-safe>; Laura M. Baber & James L. Johnson, *Early Termination of Supervision: No Compromise to Community Safety*, 77 Fed. Probation (2013), <http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2013-09/no-compromise.html>).

This case presents an ideal situation for early termination. In addition to his substantial prison time, Mr. Birkenfeld has already served over two years of supervised release, more than he believed to be the legal maximum based on statements in his signed plea agreement and proffer. (DE # 39, 77-3, p. 13, ll.15-16). He has, with the exception of one unfortunate incident for which he has separately been punished by New Hampshire authorities, shown full compliance with all conditions imposed by the Court. Mr. Birkenfeld poses no threat to the public and no risk of recidivism, and the sentence already imposed on him clearly serves any necessary deterrence objective. Moreover, he has demonstrated his will and ability to be reintegrated positively into society, and the early termination that he seeks will only further that objective. It further bears noting that, even after being sentenced and serving his time, Mr. Birkenfeld has remained fully ready and willing to continue cooperating with the United States in any way possible, and has even taken proactive steps to try to assist the government. *See* Exhibit D (email regarding offer of cooperation). Simply put, there are myriad sound reasons to terminate supervised release. At the same time, it is unclear how any of the objectives of Section 3553 or any other laws would be furthered by continuing supervised release at this time.

If, however, the Court is not inclined to terminate supervised release, it can use its discretion to modify the terms of that release in order to allow Mr. Birkenfeld to travel in order to begin rebuilding his life during the months remaining in his term. In preparation of this

motion, Mr. Birkenfeld has consulted Michael Berg, former Supervisory Probation Officer for the Southern District of Florida. Based on his long experience in cases like this, Mr. Berg has prepared a list of conditions of supervised release which, he submits, would provide enforceable supervision of Mr. Birkenfeld through the use of phones, the internet and email, faxes, and mail. If the Court were to grant Mr. Birkenfeld's request for a hearing on this motion, Mr. Berg would be prepared to testify in support of such conditions, all of which would apply if Mr. Birkenfeld were to leave the United States:

1. The defendant shall provide the probation office with documentation verifying that he voluntarily left the United States within 48 hours of departure.
2. The defendant shall provide the probation office with notification, as well as documentation, of any plans to return to the United States, including travel arrangements, where he will be residing, and length of stay, before he enters the United States. The defendant shall report to his probation officer, or the nearest probation office, within 72 hours of his arrival to the United States.
3. Within 72 hours of arriving in any foreign country, the defendant shall establish contact with his probation officer, either by telephone, email, text, or any other method as directed by his probation officer. The defendant shall provide the probation officer with any requested documentation as to his resident and employment, as directed by the probation officer.
4. The defendant shall complete monthly supervision reports as requested and submit them to the probation officer in a timely manner under a schedule approved by the Court. The defendant shall attach to these monthly reports any documentation requested by the probation officer, including but not limited to documents which provide verification of residence, employment, income, financial condition, the filing of tax returns, and any contact with local law enforcement.
5. The defendant will return to the United States as directed by the probation officer for any reason within 72 hours of notification.
6. All standard conditions and special conditions of supervised release previously imposed shall remain in force unless unenforceable by this Order.¹

¹ Mr. Berg has confirmed that requirements like those proposed herein have been imposed in this District in other cases involving defendants who sought to reside abroad while on supervised release. *See, e.g., United States v. Conti*, Case No. 99-6195-CR-RYSKAMP

It bears noting that, during the term of his release over the last two years, Mr. Birkenfeld has repeatedly traveled outside the District of New Hampshire, across the United States, with the consent of his supervising probation officer and has at all times complied with all conditions relating to such travel. There is, quite simply, every reason to believe that Mr. Birkenfeld would fully comply with any conditions imposed as a result of a modification if the Court declines the request to terminate supervised release entirely.

Conference with Opposing Counsel

Attorney Mark Daly of the United States Department of Justice has advised undersigned counsel that the government does not agree with the relief sought in this motion.

Request for Hearing

Mr. Birkenfeld respectfully requests a hearing on this matter.

(allowing American citizen on supervised release to live in Italy and Costa Rica; supervision was non-reporting but defendant was required to maintain e-mail contact with probation officer); *United States v. Bucci*, Case No. 98-CR-00405 (N.D. Ohio) (modifying supervised release conditions for defendant convicted in Northern District of Ohio but supervised in Southern District of Florida so that defendant could live in Nicaragua).

Conclusion

For the reasons set forth above – and consistent with both the governing statutes and the interest of justice – Bradley Birkenfeld respectfully requests that this Court terminate his supervised release or, in the alternative, modify the terms of supervised relief to allow him to rebuild his life in a positive and productive manner.

Dated: December 16, 2014

Respectfully submitted,

/s/Gerald E. Greenberg

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of December 2014, a true and correct copy of the foregoing is being electronically filed with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/Gerald E. Greenberg
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