

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-60099-CR-ZLOCH

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRADLEY BIRKENFELD,

Defendant.

**DEFENDANT BRADLEY BIRKENFELD'S MOTION TO EXTEND REPORT DATE FOR  
PURPOSES OF CONTINUED COOPERATION WITH U.S. GOVERNMENT  
AUTHORITIES AND FOR HEARING ON RECONSIDERATION OF SENTENCE**

Now comes the defendant Bradley Birkenfeld and respectfully moves this Honorable Court (1) to extend the date on which Mr. Birkenfeld is to report to the federal facility designated by the Bureau of Prisons, presently scheduled to be January 8, 2010, and (2), pursuant to 18 U.S.C. §3582(c)(1)(B) and 28 U.S.C. § 2255(a), to schedule a hearing before the Court to reconsider the sentence imposed by the Court on August 21, 2009.

As grounds therefore, the defendant respectfully states as follows:

(1) At a sentencing hearing on August 21, 2009, the Court granted the Government's 5K1 motion for a downward departure from the advisory guideline range of 57-60 months based upon the substantial assistance that Mr. Birkenfeld had provided to the Government.<sup>1</sup>

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<sup>1</sup> Prior to his indictment in April, 2008, Mr. Birkenfeld had voluntarily met with and provided assistance to Government prosecutors on June 12, June 19, and June 21, 2007. After his arrest in May, 2008, Mr. Birkenfeld met with and provided assistance to Government prosecutors on May 8 and May 9, 2008, June 9 and June 10, 2008, and April 3, 2009.

(2) The Government recommended that the defendant be sentenced to thirty (30) months imprisonment; given the extraordinary circumstances of the case, the defendant recommended that he be sentenced to supervised probation for a period of five years, a special condition of which would be a period of home detention. See Government's Motion for Sentence Reduction Pursuant to U.S.S.G. § 5K1.1 (Docket Entry No. 76); Sentencing Memorandum of Defendant Bradley Birkenfeld (Docket Entry No. 77).

(3) During the course of the sentencing hearing, the Government specifically stated to the Court that it "intend[ed] on continuing to utilize Mr. Birkenfeld in conducting investigations and bringing cases against other UBS clients and other clients of Mr. Birkenfeld." See Transcript of Sentencing Hearing (Honorable William J. Zloch), August 21, 2009, pp. 33-34 (Docket Entry No. 82) (hereinafter "Transcript").

(4) In connection with such continued cooperation and assistance by Mr. Birkenfeld, the Government specifically further informed the Court that it anticipated that it "may be back to this Court" for purposes of a hearing on a motion for a further reduction in sentence pursuant to Rule 35. Id. at p. 34 (Docket Entry No. 82).

(5) In response to the Court's subsequent inquiry as to "how much time [the Government] will need for the additional cooperation" of Mr. Birkenfeld, the Government requested an additional 90 days. Id. at p. 38 (Docket Entry No. 82).

(6) The Court ultimately imposed a sentence of forty (40) months imprisonment and a fine of \$30,000.

(7) Given the Government's statements regarding continued cooperation, the Court deferred execution of the sentence and ordered that Mr. Birkenfeld surrender himself at the federal facility designated by the Bureau of Prisons on January 8, 2010.

(8) Since the August 21, 2009 sentencing hearing, Mr. Birkenfeld has been ready, willing, and able to cooperate further with the Government and, as the Government stated to the Court at sentencing, to assist the Government "in conducting investigations and bringing cases against other UBS clients and other clients of [his]." *Id.* at p. 34 (Docket Entry No. 82).

(9) Since the August 21, 2009 sentencing hearing, counsel for Mr. Birkenfeld has repeatedly communicated that fact to the Government, both orally and in writing.

(10) Ironically, notwithstanding the Government's comments to the Court at the sentencing hearing, as of this date, December 26, 2009, some four months since the hearing, the Government has neither met with Mr. Birkenfeld nor asked him a single question about UBS, Swiss private banking, or any of Mr. Birkenfeld's former U.S. clients.<sup>2</sup>

(11) In the interests of fairness and in order to ensure that Mr. Birkenfeld is afforded sufficient time to provide such additional assistance to the Government and to avail himself of the opportunity to be heard on the Rule 35 motion that the Government advised the Court that it anticipated filing, an extension of Mr. Birkenfeld's voluntary surrender date is warranted.

(12) Separate and apart from the Government's statements to the Court at sentencing regarding the intended continued cooperation and additional assistance of

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<sup>2</sup> At the Government's request, on December 14, 2009, *counsel for* Mr. Birkenfeld spoke to U.S. law enforcement officials regarding the defendant's former UBS clients. Apart from that single conversation with Mr. Birkenfeld's counsel, who has no personal or direct familiarity, knowledge, or information about UBS, Mr. Birkenfeld's clients there, or Mr. Birkenfeld's clients elsewhere, the Government has not "utilized Mr. Birkenfeld" in any way in "conducting additional investigations" or "bringing additional cases".

Similarly, while the Government moved on five (5) separate occasions to continue the original sentencing hearing before this Court, it failed to ask Mr. Birkenfeld a single question about UBS, Swiss private banking, or his former U.S. clients during the one-year period of continuances from August, 2008 to August, 2009.

Mr. Birkenfeld and the potential further reduction in Mr. Birkenfeld's sentence pursuant to Rule 35, the Government made certain other factual representations to the Court at sentencing that were also arguably material to the 40-month sentence ultimately imposed by the Court.

(13) In particular, during the course of the August 21, 2009 sentencing hearing, the Government informed the Court of three significant facts that arguably were considered by the Court in fashioning an appropriate sentence: (a) that during his various pre-indictment meetings with the Government, Mr. Birkenfeld allegedly had not disclosed the name of his biggest UBS client, Igor Olenicoff, see Transcript at p. 11 and p. 33; (b) that in order to ensure that Mr. Birkenfeld could speak freely about his U.S. clients during those various pre-indictment meetings without violating Swiss bank secrecy laws, the Government allegedly had advised then counsel for Mr. Birkenfeld that it would seek an appropriate court order, see Transcript at p. 33; and (c) that Mr. Birkenfeld's whistleblower claim was allegedly a "set up" that was designed solely to obtain financial compensation, see Transcript at p. 32.<sup>3</sup>

(14) With respect to (a) Igor Olenicoff, see Transcript at p. 11 and p. 33, the fact of the matter is that on October 11, 2007 and November 13, 2007, *prior* to Mr. Olenicoff himself being charged criminally by the Government, Mr. Birkenfeld had provided sworn testimony to the U.S. Senate in which he had identified Igor Olenicoff by name, had described Mr. Olenicoff's \$200 million account at UBS, and had detailed his own involvement with Mr. Olenicoff as his (Mr. Olenicoff's) private banker at UBS. See Hearing on Tax Haven Banks and U.S. Tax Compliance, Before the U.S. Senate

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<sup>3</sup> Significantly, Mr. Birkenfeld's counsel at the August 21, 2009 sentencing hearing was not the same counsel who had represented Mr. Birkenfeld during his various pre-indictment meetings with the Government, at his arraignment, when he entered into his cooperation agreement, or at his plea hearing.

Permanent Subcommittee on Investigations, of the Committee on Homeland Security and Governmental Affairs, 110th Cong. Second Session, 110-614 (2008) (Opening Statement of Senator Levin); (Docket Entry No. 78, Exhibit F), at p. 4. Moreover, on October 12, 2007, and November 14, 2007, Mr. Birkenfeld had provided substantially the same information regarding Mr. Olenicoff to the IRS and to the SEC, respectively.<sup>4</sup>

(15) With respect to (b) a potential motion and court order that would have given Mr. Birkenfeld “the necessary legal compulsion” and protected him by means of “a known exception from Swiss bank secrecy disclosures,” see Transcript at p. 33, the fact of the matter is that no such motion or court order were ever mentioned, never mind “made clear to Mr. Birkenfeld or his [then] lawyers,” Id., nor were they ever actually sought by the Government.<sup>5</sup> To the contrary, at each step, the Government refused to honor then counsel for Mr. Birkenfeld’s requests for immunity, for a subpoena (which the U.S. Senate had readily provided him in order to secure his full testimony), or for any other legal safeguard.

(16) With respect to (c), Mr. Birkenfeld’s whistleblower claim, see Transcript at p. 32, the fact of the matter is that the whistleblower letter was not a “set up” designed to get compensation from UBS, but rather a genuine attempt to expose wrongdoing and to prevent employee retaliation.<sup>6</sup> Tellingly, notwithstanding the Government’s characterizations of Mr. Birkenfeld’s whistleblower letter during the sentencing hearing before this Court in August, 2009, in entering into the historic Deferred Prosecution

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<sup>4</sup> Counsel has confirmed as much with then counsel for Mr. Birkenfeld, Schertler & Onorato, LLP. See footnote 3 supra.

<sup>5</sup> Id. See footnote 3 supra.

<sup>6</sup> Ironically, the applicable U.S. whistleblower law that affords financial awards was not even enacted until December, 2006, some nine (9) months after Mr. Birkenfeld had commenced his UBS whistleblowing efforts in March, 2006.

Agreement with UBS in February, 2009, the same Government prosecutors referenced and utilized the same whistleblower letter in the Agreement's "Statement of Facts" section as factual support for the culpability of UBS. See Deferred Prosecution Agreement, Exhibit C ("Statement of Facts"), Paragraph 15, p. 6 ("[f]ollowing a March 2006 whistleblower letter by a former Geneva-based UBS private banker alleging that the actual practices of UBS private bankers ....), a copy of which is attached hereto as Exhibit A.

Accordingly, for the reasons set forth above, the defendant respectfully submits that the Court should extend the date on which Mr. Birkenfeld is to self-report to the Bureau of Prisons (presently scheduled to be January 8, 2010) so that he may continue the assistance and cooperation that the Government has repeatedly referenced before this Court and for which Mr. Birkenfeld has been ready, willing, and able to provide since his change of plea in June, 2008. See generally, Santobello v. New York, 404 U.S. 257 (1971).<sup>7</sup>

Moreover, as set forth above, given the nature and significance of the representations made to the Court by the Government at the August 21, 2009 sentencing hearing, including those related to the intended continued cooperation and additional assistance of Mr. Birkenfeld, as well as those related to the factual considerations outlined above, the defendant respectfully submits that, in the interests of fairness and due process, the Court should schedule a hearing to further review those representations and to reconsider the sentence imposed that day upon Mr. Birkenfeld. See generally, Shukwit v. United States, 973 F.2d 903 (11th Cir. 1992); Parks v. United

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<sup>7</sup> The defendant attempted unsuccessfully to contact the Government attorneys assigned to this case via electronic mail regarding the Government's position on the instant motion.

States, 832 F.2d 1244 (11th Cir. 1987); United States v. Hollenbeck, 932 F. Supp. 53 (ND NY 1996).

Respectfully submitted,

**s/ David E. Meier** \_\_\_\_\_

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Admitted *Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was electronically filed by CM/ECF this 26th day of December 2009.

Respectfully submitted,

**s/ Robert W. Stickney**

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