

3. The parties had originally intended to seek a further postponement of sentencing to enable Dr. Nozette's cooperation to continue. However, on October 19, 2009, Dr. Nozette was unexpectedly arrested and charged in a criminal complaint with attempted espionage in violation of Title 18, United States Code, Section 794(a).

4. Shortly after his arrest on the attempted espionage charges, the United States moved to unseal this matter. The Court unsealed this case, with limited exceptions, by order dated October 23, 2009.

5. On October 27, 2009, the United States filed a Status Report Of The Parties On The Defendant's Sentencing Date. In that filing, the government took the position that, in light of the arrest on the attempted espionage charges and the unsealing of this case, sentencing should proceed as scheduled on November 18, 2009. The Status Report noted that Dr. Nozette did not agree.

6. The attempted espionage case was originally assigned to Judge Walton. On October 28, 2009, upon motion of the government not opposed by the defense, the attempted espionage case was reassigned to this Court. This Court now has pending before it both the original charges against Dr. Nozette, on which he awaits sentencing, and the new attempted espionage charges, on which he awaits trial.

7. A detention hearing in the attempted espionage case was held before Magistrate Judge Robinson on October 29, 2009. Judge Robinson ordered that Dr. Nozette be detained without bond pending trial on the attempted espionage charges.

8. In light of the attempted espionage charges and their pendency before this Court, Dr. Nozette respectfully submits that it would be in the interests of justice to postpone sentencing in this matter until the attempted espionage charges have been resolved, because, among other things:

a. The Government's allegations in the espionage case include allegations of misconduct by Dr. Nozette overlapping the same time period at issue with the instant charges. In the course of presiding over the resolution of the attempted espionage charges, this Court will likely learn important information as to how to weigh the alleged espionage-related conduct in determining an appropriate sentence on the fraud and tax evasion charges. To take the most obvious circumstance, if Dr. Nozette were to be acquitted of the attempted espionage charges, then there would be no basis for sentencing Dr. Nozette as if he had violated his plea agreement, or for relieving the United States of its obligations under that agreement. To paraphrase Lewis Carroll's Red Queen, a "sentence first – verdict later" approach makes little sense here.

b. Dr. Nozette's financial condition and ability to pay financial penalties will almost certainly be materially altered by the need to defend the attempted espionage charges. Sentencing decisions concerning fines and restitution should be based on accurate and current information in an updated Presentence Investigation Report that takes into account the impact of the attempted espionage charges after they have been resolved.

c. Sentencing Dr. Nozette in this case could also complicate access to Dr. Nozette by his counsel in the attempted espionage case. The attorney defending that case will almost certainly need to communicate with his client extensively prior to trial, and remanding

Dr. Nozette to the custody of the Bureau of Prisons could materially impede such communication.

d. Judicial economy will be served by considering the appropriate punishment, if any, for Dr. Nozette in both cases together, so that the Court may make a holistic assessment of his conduct and culpability and the relationship of multiple sentences (if there were to be multiple convictions) to one another in a single overall proceeding.

e. Dr. Nozette is currently being held without bond in the attempted espionage case, so a continuance of sentencing in this matter will have little practical impact on the interests of the United States in punishment or incapacitation during this interim period.

9. In the alternative, Dr. Nozette respectfully requests that sentencing in this matter be postponed 60 days to allow additional time for counsel to take account of the changed circumstances and prepare an appropriate sentencing submission. In light of the recent arrest, the Probation Office may need to alter the PSR, and the sentencing memorandum submitted on Dr. Nozette's behalf will also need to be changed substantially. A sentencing proceeding that both parties expected, until several days ago, to focus on the appropriate magnitude of an anticipated downward departure for providing substantial assistance to the authorities will now have a significantly different focus.

10. Undersigned counsel has contacted counsel for the government, Assistant United States Attorney Michael Atkinson, seeking consent to the relief sought by this motion, but the government did not consent to the relief requested herein.

Bradford A. Berenson, Esq.
bberenson@sidley.com
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009, I caused a true and correct copy of the foregoing MOTION TO CONTINUE SENTENCING to be served by electronic mail upon:

Michael K. Atkinson, Esq.
michael.atkinson2@usdoj.gov
Assistant United States Attorney
United States Attorney's Office
555 Fourth Street, N.W., Room 5830
Washington, D.C. 20530

/s/

Bradford A. Berenson