SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

ELENA R. SASSOWER,	
Defendant,	
v.	**Case No. M4113-03** **Calendar 1: Judge Holeman**
UNITED STATES,	
Plaintiff.	**ORAL ARGUMENT REQUESTED**

DEFENDANT'S MOTION PURSUANT TO D.C. R. CRIM. P. 35(a) AND D.C. CODE § 23-110(a) TO CORRECT AN ILLEGAL SENTENCE

Nathan Lewin (D.C. Bar No. 38299)
Alyza D. Lewin (D.C. Bar No. 445506)
LEWIN & LEWIN, L.L.P.
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 828-1000
(202) 828-0909 fax

Steven Lieberman (D.C. Bar No. 439783)
R. Elizabeth Brenner (D.C. Bar No. 461486)
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
1425 L St., NW, Suite 800
Washington, D.C. 20005
(202) 783-6040
(202) 783-6031 fax

Attorneys for Defendant Elena R. Sassower

Dated: October 26, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other References

INTRODUCTION

Elena Sassower, who has now been incarcerated in the D.C. Correctional Treatment Facility for the past 119 days, respectfully moves this Court pursuant to D.C. R. Crim. P. 35(a) and D.C. Code §23-110(a) to correct an illegal sentence. Specifically, Ms. Sassower challenges this Court's doubling of an announced criminal sentence from 92 days to 180 days when Ms. Sassower declined to agree to one of the conditions of probation proffered by the Court; that is, the Court's requirement that Ms. Sassower write a letter of apology to certain Senators and to Judge Richard C. Wesley expressing "remorse for any inconvenience caused by [her] action" in speaking as the Chairman adjourned the May 22, 2003 hearing of the Senate Judiciary Committee on the nomination of Mr. Wesley to the United States Court of Appeals for the Second Circuit. In support of this motion, Ms. Sassower advances constitutional (see Section I, below) and statutory (see Sections II - IV, below) arguments as to why Ms. Sassower's sentence was illegal.

This motion is filed with a full understanding that matters relating to Ms. Sassower's case have been before this Court on a number of occasions since her conviction, and that this Court has consistently declined to grant any relief with respect to either the conviction or the sentence–even though on the last occasion on which a motion with respect to Ms. Sassower's sentence was before this Court, the Office of the United States Attorney did not oppose Ms. Sassower's release pending appeal. This motion is being filed despite this Court's past refusal to reconsider Ms. Sassower's sentence because of the substantial merit of the constitutional and

statutory arguments[1] set forth below.

Although the specific constitutional and statutory challenges set forth below have not previously been presented to this Court (other than the argument at Section IV below), because an Order granting this motion would involve this Court reconsidering the propriety of the sentence that it imposed on June 28, 2004, Defendant respectfully brings to this Court's attention the words of Judge Edwards, writing for a unanimous panel (Mikva, C. J. and Wald, J.) of the U.S. Court of Appeals of the D.C. Circuit in an opinion granting a petition for rehearing:

> I often have been struck by Justice Stewart's concurring statement in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 26 L. Ed. 2d 199, 90 S. Ct. 1583 (1970), a case in which the Court reconsidered and overruled an earlier decision. Justice Stewart remarked that, "in these circumstances the temptation is strong to embark upon a lengthy personal apologia." Id. at 255. This remark has special poignancy for me now, because it underscores the distress felt by a judge who, in grappling with a very difficult legal issue, concludes that he has made a mistake of judgment. Once discovered, confessing error is relatively easy. What is difficult is accepting the realization that, despite your best efforts, you may still fall prey to an error of judgment. Like Justice Stewart, I will take refuge in an aphorism of Justice Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600, 93 L. Ed. 259, 69 S. Ct. 290 (1949).

Moldea v. New York Times Co., 22 F. 3d 310 (D.C. Cir. 1994).

STATEMENT OF FACTS

On May 22, 2003, the Senate Judiciary Committee held a hearing on the nomination of Richard C. Wesley to the United States Court of Appeals for the Second Circuit. As the hearing adjourned, Ms. Sassower requested that she be able to testify in opposition to Mr. Wesley's

---

[1] Defendant, by delineating only these four arguments in this motion, does not intend to waive, and on the contrary intends to preserve and does preserve, the full panoply of its challenges to both the conviction and the sentence imposed by this Court. Because of Ms. Sassower's incarceration, Counsel - - who are serving pro bono publico - - have not had a full opportunity to review all of the issues in this case with Ms. Sassower. Defendant therefore reserves the right to amplify, extend, or supplement this filing with a subsequent motion under D.C. Code §23-110.

nomination. She was escorted from the room, handcuffed, and later arrested for the misdemeanor offense of disruption of Congress under D.C. Code § 10-503.16(b)(4).

Ms. Sassower served two days' imprisonment following her initial arrest before she was released on her personal recognizance. Ms. Sassower represented herself at a trial before this Court, where a jury convicted her of disruption of Congress on April 20, 2004. She remained free on her personal recognizance after her conviction.

Under D.C. Code § 10-503.18(b), the maximum penalty for this misdemeanor offense is six-months' imprisonment and a $500 fine. After pre-sentence investigation, the U.S. government recommended a five-day suspended sentence and six months' probation conditioned on completion of an anger-management course. Exhibit 1. The D.C. government recommended only the imposition of a fine *without* jail time. Exhibit 2.

Ms. Sassower voluntarily appeared for sentencing on June 28, 2004 before this Court, again appearing pro se. Exhibit 3. This Court then announced that it was "ready to impose sentence," id. at 14, "ready to pronounce sentence," id. at 15, and "about to impose sentence," id. This Court pronounced its sentence as follows:

> Ms. Sassower, I'm sentencing you to 92 days, I'm going to give you credit for any time served in this case. I'm going to suspend execution as to all remaining time.
>
> I will place you on two years probation. During the probationary term – well, let me back up then before I get into the probationary term.
>
> You will pay a $500 fine, within 30 days of the sentencing date, so that's within 30 days of today.
>
> You will pay $250 to the Victims of Violent Crimes Compensation Fund within 30 days of today.

Exhibit 3 at 16.

This Court then specified the conditions of probation, which included the requirement that Ms. Sassower write letters of apology and remorse to five Senators and Judge Wesley.

> Finally, letters of apology. Within 30 days of today, you shall prepare and

forward to Senators Hatch, Leahy, Chambliss, Schumer, Clinton and to Judge Wesley letters of apology which state the fact of your conviction for violation of D.C. Code Section 10-503.16(B)4 and your remorse for any inconvenience caused - -

MS. SASSOWER: I am not remorseful and I will not lie.

THE COURT: And your remorse for any inconvenience caused by your action. Copies of these letter must be sent to me, the presiding judge.

MS. SASSOWER: They will not be sent because they will not be written.

id. at 21.

Based on her firmly held opinions regarding Mr. Wesley's nomination and the public's role in the judicial confirmation process, Ms. Sassower objected to the requirement that she express remorse, and did not consent to probation under this Court's conditions, as is permitted under the concluding sentence of D.C. Code § 16-710(a) ("A person may not be put on probation without his consent"). Id. at 21-22.

Presumably because Ms. Sassower would not agree to write letters expressing her remorse, this Court disregarded its already-pronounced sentence and doubled Ms. Sassower's sentence to the maximum statutory penalty:

THE COURT: Very well. Then, sentence is imposed as follows:

You are sentenced to six months incarceration.

You will pay, within 30 days, following your incarceration, $500 as the fine that attaches to the penalty as to the offense for which you've been convicted.

You will also pay, within 30 days, following your incarceration, the $250 compensation – contribution to the Victims of Violent Crimes Fund.

Ms. Sassower, once again, your pride has gotten in the way of what could have been a beneficial circumstance for you. This incarceration begins forthwith; step her back.

Id. at 22.

Ms. Sassower filed a notice of appeal on June 29, 2004. Ms. Sassower has filed numerous pro se motions in both this Court and the Court of Appeals, all of which have been denied. Ms. Sassower then retained present counsel in mid-to-late September and on September 23, 2004, Ms. Sassower, through counsel, filed in the Court of Appeals an Unopposed

Emergency Motion For Release to Preclude Mootness of Appellate Issue, which was denied that same day without prejudice to refiling in the Superior Court. The motion was refiled in this Court the same day and was denied on September 24, 2004. Ms. Sassower appealed that ruling to the Court of Appeals on October 6, 2004 and the Court of Appeals denied Ms. Sassower's appeal on October 14, 2004. Exhibit 4.

ARGUMENT

I. THIS COURT'S REQUIREMENT THAT MS. SASSOWER EXPRESS REMORSE FOR REQUESTING PERMISSION TO SPEAK AT THE WESLEY CONFIRMATION HEARING AND THEN PUNISHING HER REFUSAL TO WRITE THE REQUIRED WORDS OF REMORSE BY DOUBLING HER SENTENCE, VIOLATED MS. SASSOWER'S RIGHTS UNDER THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

In general, courts have broad discretion in crafting conditions of probation post conviction. That broad discretion has been held to include the ability to require a convicted defendant to make a public apology for the criminal act committed. One of the most oft-cited cases on this point is a ruling by the United States Court of Appeals for the Ninth Circuit which upheld a condition of probation that required a police officer to make a public apology for committing perjury. U.S. v. Clark, 918 F. 2d 843, 848 (9th Cir. 1990). In that case, the Court rejected Clark's First Amendment challenge, holding that the public apology "may serve a rehabilitative purpose" and that Clark's First Amendment right to refrain from speaking was trumped by that governmental interest. Id.

Other cases have also recognized a court's right to require an apology to the public or to the victims of the crime as a condition of probation.

However, in this case the direction that Ms. Sassower apologize to Judge Wesley and to the members of the Senate Judiciary Committee, would have required Ms. Sassower to espouse a political view with which she did not agree. Specifically, Ms. Sassower's presence at the hearing of the Senate Judiciary Committee and her request to speak at the hearing reflected her firmly held opposition to the nomination of Judge Wesley and her view that he was unfit to become a member of the federal judiciary. It also reflected her view that citizens have a meaningful role to play in the judicial confirmation process. A letter of apology expressing her "remorse" would have required her to renounce her firmly held political beliefs and, in essence

to adopt and espouse the view that Mr. Wesley was appropriately qualified to be appointed to the federal bench and that citizens should not be permitted to contribute to discourse regarding the confirmation process.

The United States Supreme Court has long held that such compelled speech is not premissible under the First Amendment. In Bd. of Educ. v. Barnette, the Supreme Court struck down a statute requiring school children to repeat the pledge of allegiance.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). The Supreme Court in Barnette analyzed precisely what was at issue when schoolchildren are required to recite the pledge of allegiance:

> it is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.... To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

319 U.S. at 633-34.

Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), the Supreme Court held that the State of New Hampshire could not constitutionally punish a citizen for refusing to display on his license plate the motto "live free or die." The Court cited Mr. Maynard's firmly held belief that:

> I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent.

430 U.S. at 713.

The Court began its analysis with the proposition "that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." Id., 430 U.S. at 714, citing Barnette. The Supreme

Court then applied "strict scrutiny" analysis to ascertain whether the government's interest in requiring Mr. Maynard to display this motto was compelling and whether the end sought by the legislature could be "more narrowly achieved... [by] less drastic means." 430 U.S. at 716. This strict scrutiny approach to governmental actions requiring an individual to speak has been applied in succeeding cases. See, e.g., Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 798 (1988) (applying "exacting First Amendment scrutiny" to a North Carolina statute compelling certain disclosures by fundraisers).

The applicability of these constitutional principles to certain increasingly-creative conditions that courts have imposed in sentencing has been widely recognized. See, e.g., Jaimy M. Levine, Comment: "Join the Sierra Club!": Imposition of Ideology as a Condition of Probation, 142 U. Pa. L. Rev. 1841 (1994) ("Join the Sierra Club"); Andrew Horwitz, Coersion, Pop-psychology and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions, 57 Wash. & Lee L. Rev. 75 (2000). In Join the Sierra Club, the author focused on the difference between an apology for criminal activity (specifically, the apology upheld by the Court of Appeals for the Ninth Circuit in Clark, supra) and apologies and other conditions "that impose ideology." 142 U. Pa. L. Rev. at 1874-79. The authors concluded that where an apology in effect requires the defendant to adopt a particular ideology or set of beliefs, then such a condition is constitutionally impermissable.

> Ideology-related probation conditions purport to rehabilitate the offender through education. The nature of this education, however, is not limited to an explanation of the laws or to suggestions as how to end an addiction; rather, the education extends beyond this proper boudary into the realm of moral education that imposes on constitutional rights. As discussed below, the constitution protects the freedom from government imposition of ideology.

Id. at 1879.

The compelled acceptance of certain ideological beliefs is precisely what was put at issue

by this Court's requirement that Ms. Sassower express remorse.

At sentencing, Ms. Sassower did not object to this Court's requirement that she write letters "which state the fact of your conviction for violation of D.C. Code § 10-503.16(B)(4)" Ex. 3 at 21. Quite to the contrary, Ms. Sassower plainly stated that her objection to the letters required by this Court was that she was not remorseful, and would not say that she was remorseful for what she had done. This is a key distinction, for if the Court had only required a letter stating the fact of her conviction, that would not have implicated Ms. Sassower's ideological beliefs.

But the condition that Ms. Sassower express remorse required her to abandon her firmly held views that: (a) Judge Wesley was not appropriately qualified to become a member of the federal judiciary; and (b) members of the American public have a right to contribute in a meaningful fashion to the judicial selection process. As this Court is well aware, Ms. Sassower is Co-founder and Coordinator of the Center for Judicial Accountability, whose stated admission is: "to improve the quality of our judiciary by removing political consideration from the judicial selection process and by insuring that the process of diciplining and removing judges is effective and meaningful." Ex. 4. To require Ms. Sassower to express remorse for attempting to participate in a judicial confirmation hearing would be to compel her to abandon her long-held political beliefs.[2]

This the Constitution does not permit. For this reason, this Court's decision to impose the apology (containing an expression of remorse) as a condition of probation violated both the United States Constitution (both the First Amendment and the Fifth Amendment Due Process

---

[2] Ms. Sassower has believed for more than three decades that the public must have a meaningful role in all aspects of the political process. See, e.g., Ex. 5 (a copy of the front page of the July 8, 1974 edition of The New York Times showing Ms. Sassower in front of the U.S. Supreme Court after having waited for three days as first on line to attend oral argument in U.S. v. Nixon).

Clause), and the sentence imposed upon Ms. Sassower is thus illegal.

II. IF UNDER D.C. CODE § 24-304(A) A COURT MAY NOT INCREASE A DEFENDANT'S SENTENCE FOR VIOLATING A CONDITION OF PROBATION, *A FORTIORI* THIS COURT ALSO COULD NOT INCREASE MS. SASSOWER'S SENTENCE FOR REFUSING TO ACCEPT THE PROBATION OFFERED.

District of Columbia Code § 24-304(a) enumerates the sanctions that a Court can impose for violations of conditions of probation:

> ... At any time during the probationary term the court may modify the terms and conditions of the order of probation, or may terminate such probation, when in the opinion of the court the ends of justice shall require, and when the probation is so terminated the court shall enter an order discharging the probationer from serving the imposed penalty; or the court may revoke the order of probation and cause the rearrest of the probationer and *impose a sentence and require him to serve the sentence or pay the fine originally imposed, or both, as the case may be, or any lesser sentence.* ...

(emphasis added).

It is well settled that § 24-304(a) provides that upon revocation of probation a court may only impose a new sentence that is *no more severe* than the original sentence. Moore v. U.S., 468 A.2d 1331, 1332 (D.C. App. 1983) (quoting Mulky v. U.S., 451 A.2d 855, 856 (D.C. App. 1982) ("[T]he trial court has discretion to impose any sentence that the court could have imposed upon conviction, provided that the new sentence is *no more severe* than the original sentence.")(emphasis added)); ***see also Jones v. U.S.***, 560 A.2d 513, 517 (D.C. App. 1989)("[V]iolation of a condition of probation may be sanctioned only through revocation of probation and imposition of all or part of the original sentence.").

If a court cannot increase a defendant's sentence for violating a condition of probation, *a fortiori* a court also cannot increase a defendant's sentence for refusing to accept the terms of probation offered. In other words, if it would have been illegal under § 24-304(a) for this Court to increase Ms. Sassower's sentence had she broken the probation offered her, it must also have

been illegal for this Court to increase Ms. Sassower's sentence for not consenting to the probation in the first place. But that is exactly what occurred: this Court increased Ms. Sassower's sentence to 180 days' imprisonment because she would not accept the probation offered in lieu of its previously imposed 92-day sentence. Under § 24-304(a), the only action this Court was permitted to take upon Ms. Sassower's refusal of probation was to impose its original 92-day sentence, or a lesser sentence.

III. THIS COURT'S INCREASED SENTENCE VIOLATED D.C. CODE § 16-710(A) BY PUNISHING MS. SASSOWER FOR NOT CONSENTING TO THE PROBATION OFFERED.

This Court's increased sentence also violated D.C. Code § 16-710(a), which states in pertinent part as follows:

> [I]n criminal cases in the Superior Court of the District of Columbia, the court may, upon conviction, ... impose sentence and suspend the execution thereof, or impose sentence and suspend the execution of a portion thereof, for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby. In each case of the imposition of sentence and the suspension of the execution thereof, or the imposition of sentence and the suspension of the execution of a portion thereof, the court may place the defendant on probation under the control and supervision of a probation officer. ... *A person may not be put on probation without his consent.*

(emphasis added).

Ms. Sassower undisputably had a statutory right under § 16-710 to decline probation under the conditions required by this Court in lieu of its 92-day non-probationary sentence. Jones v. U.S., 560 A.2d at 516 n.3; see also Jamison v. U.S., 600 A.2d 65, 70 (D.C. App. 1991) ("That subsection provides for the suspension of imposition or execution of sentence and authorizes the court in such circumstances to place the defendant on probation. However, it contains the specific proviso that "a person may not be put on probation without his consent. ... [T]he language here is clear....").

Consent is generally recognized to be invalid unless it is freely and voluntarily given, and not the result of duress or coercion, express or implied. *Martin v. U.S.*, 567 A.2d 896, 905 (D.C. App. 1989). This Court's punishment of Ms. Sassower for exercising her statutory right was an inherently coercive and punitive action. If a court can punish a defendant with a longer or harsher sentence for not consenting to the terms of probation, the statutory right not to consent to probation is meaningless.

IV. THIS COURT'S INCREASED SENTENCE ALSO VIOLATED RULE 32(C) OF THE CRIMINAL RULES OF THE SUPERIOR COURT.

Rule 32(c)(2) of the District of Columbia Superior Court Rules of Criminal Procedure, directs that "[s]entence shall thereafter be pronounced." It is well settled that the equivalent provision of the Federal Rules of Criminal Procedure prohibits a district judge from revising his or her orally pronounced sentence either upward or downward because of a change of heart. See, e.g., U.S. v. Aguirre, 214 F. 3d 1122, 1125 (9th Cir. 2000); U.S. v. Layman, 116 F.3d 105, 108 (4th Cir. 1997); U. S. v. Abreu-Cabrera, 64 F.3d 67, 73 (2nd Cir. 1995); U.S. v. Townsend, 33 F.3d 1230, 1231 (10th Cir. 1994). This Court's revised sentence was purely punitive, there being no new facts or circumstances occurring between the time it pronounced its original sentence and the time it doubled that sentence other than Ms. Sassower's refusal to consent to probation. A Court should be prohibited from taking such punitive action as a matter of law under Rule 32(c)(2).

V. PURSUANT TO D.C. CODE §23-110 DEFENDANT REQUESTS THAT THE COURT GRANT A PROMPT HEARING ON THIS MOTION AND IN ITS RULING INCLUDE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

D.C. Code §23-110 requires that unless the records of the case "conclusively show that the prisoner is entitled to no relief"–a standard that we submit cannot be met in light of the constitutional and statutory arguments set forth above–the Court grant a prompt hearing on this

motion and in ruling on the motion "make findings of fact and conclusions of law with respect thereto." D.C. Code §23-110 (c). We request such a hearing and such findings.

CONCLUSION

For the foregoing reasons, this Court should correct Ms. Sassower's illegal sentence and order her immediate release from the D.C. Correctional Treatment Facility.

Respectfully submitted,

NATHAN LEWIN (D.C. Bar No. 38299)
ALYZA D. LEWIN (D.C. Bar No. 445506)
LEWIN & LEWIN, L.L.P.
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 828-1000
(202) 828-0909 fax

STEVEN LIEBERMAN (D.C. Bar No. 439783)
R. ELIZABETH BRENNER (D.C. Bar No. 461486)
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
1425 L St., NW, Suite 800
Washington, D.C. 20005
(202) 783-6040
(202) 783-6031 fax

Attorneys for Defendant Elena R. Sassower

Dated: October 26, 2004