

1 On June 25, 1994, Defendant was arrested for illegal possession of a controlled substance.
2 Two days later, the Government filed an information in Criminal Case No. 94-85, based on this
3 arrest. This case was dismissed without prejudice on December 6, 1994, based on the failure to
4 provide Defendant with a speedy trial. In its dismissal order the Court required that any new
5 prosecution by the Government would have to be brought to trial within three months.

6 On March 3, 1995, the Government filed a new prosecution against Defendant, Criminal Case
7 No. 95-40, also based on the June 25, 1994 arrest. However, this case was not brought to trial
8 within the three month period mandated by the dismissal order in Case No. 94-85. Therefore, Case
9 No. 95-40 was dismissed with prejudice on June 12, 1995.

10 These proceedings to revoke Defendant's probation were instituted on March 6, 1995. The
11 Government's motion to revoke probation cited Defendant's failure to obey Commonwealth law,
12 citing the facts alleged in the Information in Criminal Case No. 95-40. This motion followed.

13 14 **II. ISSUES**

15 Two issues are presented for the Court's review:

16 1. Whether the Government must obtain a criminal conviction of a defendant prior to
17 commencing proceedings to revoke probation based on a claim that the defendant failed to obey
18 Commonwealth law; and

19 2. Whether a pre-trial dismissal of a criminal prosecution bars any further proceedings
20 to revoke probation based on the same conduct alleged in the dismissed prosecution.

21 22 **III. ANALYSIS**

23 **A. Conviction as Prerequisite to Revocation**

24 Title 6, section 4113(b) of the Commonwealth Code provides:

25 Upon violation of any of the terms and conditions of probation at any time during the
26 probationary period, the court may issue a warrant for the rearrest of the person on
27 probation and, after giving the person an opportunity to be heard and to rebut any
evidence presented against the person, may revoke and terminate the probation.

1 This statute does not expressly require that a violation of Commonwealth law be proven by a criminal
2 conviction for the underlying offense, and Defendant has offered no basis on which the Court could
3 infer such a requirement by implication.

4 Moreover, neither the U.S. nor the Commonwealth Constitution compels such a procedure.
5 See *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972). The Ninth Circuit has made clear that the applicable
6 constitutional standard of proof for revocation proceedings is a preponderance of the evidence, not
7 proof beyond a reasonable doubt. *Standlee v. Rhay*, 557 F.2d 1303, 1307 (9th Cir. 1977).¹ See also
8 *State v. Palama*, 612 P.2d 1168 (Haw. 1980) (constitution does not require proof of conviction to
9 revoke probation, but state statute does); compare *People v. Anzures*, 670 P.2d 1258, 1259 (Colo.
10 App. Ct. 1983) (state statute requires commission of crime to be proven beyond reasonable doubt
11 unless criminal conviction has already been obtained); but see *State v. Debnam*, 209 S.E. 2d 409
12 (N.C. 1974). And while no Commonwealth precedent exists on point, the Analysis to the
13 Constitution and Commonwealth Supreme Court precedents make clear that the due process
14 guarantees of Art. I, § 5 are intended to be coextensive with those of Section 1 of the Fourteenth
15 Amendment to the U.S. Constitution. ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF
16 THE NORTHERN MARIANA ISLANDS, 20, 21 (1976); *Office of the Attorney General v. Rivera*, 2 N.M.I.
17 436 (1993). Therefore, there is no legal basis for requiring the Government to submit proof of
18 conviction in order to obtain a revocation of Defendant's sentence, and the Court declines to do so.

19 20 **B. Prior Dismissal as Bar to These Proceedings**

21 Defendant next argues that the Double Jeopardy Clause and the doctrine of collateral estoppel
22 prevent the Government from bringing these proceedings, since two efforts at criminal prosecution

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24 ¹ In her Reply Memorandum (at 3), counsel for Defendant cited the lower court opinion in
25 *Standlee* (403 F. Supp. 1247 (W.D. Wash. 1974)) for the proposition that the sanction imposed by
26 revocation is punitive in nature. However, the Ninth Circuit, in the case cited here, reversed on
27 precisely this issue. See 557 F.2d at 1306-7 (revocation is remedial, not punitive in nature).
Apparently, neither counsel in this case perceived this error, despite the fact that the Ninth Circuit's
28 opinion in *Standlee* is among the most relevant precedents the Court consulted in reviewing this
motion. *Shepard's Citations*, while rarely a scintillating text, is often a critical step on the road to
enlightenment, and the Court commends it to the attention of both counsel in future cases.

1 based on the same underlying allegations were dismissed, the second with prejudice. These
2 arguments likewise fail.

3 As to the double jeopardy clause, under both the Commonwealth and the United States
4 Constitutions, jeopardy does not attach until the judge begins to hear the evidence or the first witness
5 is sworn. *Commonwealth v. Tebia*, Traffic Case No. 93-980, slip op. at 5 (N.M.I. Super. Ct. Nov.
6 22, 1994); *Serfass v. U.S.*, 95 S.Ct. 1055 (1975); *Commonwealth v. Oden*, 3 N.M.I. 186, 205-6
7 (1992). Defendant cites *Commonwealth v. Ahn*, 3 C.R. 37 (D.N.M.I. App. Div. 1987) for the
8 proposition that a dismissal with prejudice, such as the one here, triggers the double jeopardy rule.
9 However, *Ahn*, contains no such holding, and other authorities make clear that a dismissal triggers
10 double jeopardy only *if* the dismissal occurs *after* jeopardy attaches. Twenty-Fourth Annual Review
11 of *Criminal Procedure*, 83 GEO. L.J. 1046 (1995) (“[o]nce jeopardy attaches, the Double Jeopardy
12 Clause prohibits retrial after any dismissal [...] that operates as an acquittal”); see also *U.S. v. Valle*,
13 697 F.2d 152, 154 (6th Cir. 1983). Thus, double jeopardy does not bar these proceedings.

14 Nor do the more general principles of collateral estoppel bar these proceedings. While a split
15 of authority exists on point, the authorities cited in Defendant's brief represent a minority position
16 which has been rejected by the Ninth Circuit and other state courts. *Standlee*, 557 F.2d at 1305-6.²
17 See *also* *State v. Jameson*, 541 P.2d 912 (Ariz. 1975) (rejecting reasoning of *People v. Grayson*, 319
18 N.E.2d 43 (Ill. 1974)); Annotation: Acquittal in Criminal Proceeding as Precluding Revocation of
19 Probation on Same Charge, 76 A.L.R.3d 564 (collecting cases). This Court does not go so far as
20 to decide, as the cited authorities do, that probation revocation proceedings may be instituted even
21 after an acquittal at a trial on the merits, as that issue is not presented here. However, it is clear that
22 where the facts giving rise to the other criminal charge were never litigated, as here, a pretrial
23 dismissal on procedural grounds will not bar probation revocation proceedings.

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26 ² *Standlee* deals with revocation of parole rather than probation. However, the Constitutional
27 standards of due process are indistinguishable for parole and probation revocation proceedings. See
28 *U.S. v. Meeks*, 25 F.3d 1117, 1211 (2nd Cir. 1994).

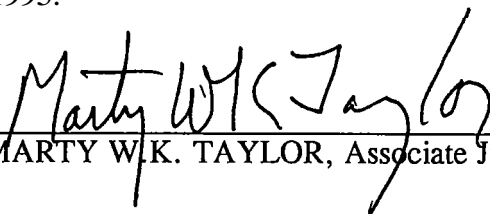
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IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss the Government's motion to revoke probation is hereby DENIED.

So ORDERED this 28th day of July, 1995.


MARTY W.K. TAYLOR, Associate Judge