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IN THE  
SUPREME COURT OF THE UNITED STATES

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No.\_\_\_\_\_

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JAMES BAXTER,  
Petitioner,  
v.

UNITED STATES,  
Respondent.

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On Petition for Writ of Certiorari to the

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED FOR REVIEW**

1. Did the D.C. Circuit err in affirming the order requiring payment of Federal Tort Claim settlement funds towards a criminal restitution order, when these funds were intended to restore petitioner to the *status quo* for mental distress inflicted by the medical negligence committed by the United States during his incarceration and no positive *bona fide* change was shown in his ability to pay, contrary to 4<sup>th</sup> and 11<sup>th</sup> Circuit decisions?

LIST OF PARTIES

James Baxter

United States

Washington Teachers Union (intervenor)

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\*Authorities upon which petitioner chiefly relies.

## **OPINIONS BELOW**

The U.S District Court for the District of Columbia entered judgment against petitioner James Baxter on May 3, 2018, Appendix A at page 11-12. The United States Court of Appeals for the District of Columbia Circuit entered judgment on February 19, 2019 and appears in Appendix A at page 17.

## **JURISDICTION**

The United States Court of Appeals for the District of Columbia Circuit rendered its decision on February 20, 2019. Petitioner filed a timely application for extension of time to file this petition until July 19, 2019, which was granted in 18A1122. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

## **STATUTORY PROVISION INVOLVED**

18 U.S.C.A. § 3664(k) provides that “[a] restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.”

## **STATEMENT OF THE CASE**

### **A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below**

On November 20, 2003, James Odell Baxter ("Baxter") was indicted on 27 counts, including one count of Conspiracy, 18 U.S.C. § 371; five counts Wire Fraud and Deprivation of Honest Services, 18 U.S.C. §§ 1343,1346; three counts of Mail Fraud and Deprivation of Honest Services, 18 U.S.C. §§ 1341,1346; as well as related multiple offenses of false statements, money laundering, embezzlement, and theft arising from schemes to defraud the Washington Teachers' Union ("WTU"). Mr. Baxter was convicted of 23 counts by the jury. On June 5, 2006, Mr. Baxter was sentenced, in aggregate, to 120 months incarceration to be followed by concurrent 36 months of supervised release on Counts 1 through 19 and 12 months of supervised release on Counts 20 through 23. He was ordered to pay \$2,300 for special assessments as well as \$4,249,187.00 in restitution, joint and severally liable with his codefendants. For special conditions of his supervised release, this Court ordered that he pay the balance of any restitution and special assessment at the rate of no less than \$300 each month, provide probation access to any financial information, and complete 900 hours of community services at a rate of no less than 300 hours per year.

During his supervised release, the Washington Teachers' Union filed a motion for adjustment of defendant's restitution payment schedule based on his settlement with the United States concerning a medical negligence matter that arose during his incarceration in this case. Over objection, Judge Leon granted this

motion and ordered that Mr. Baxter pay the lion's share of his settlement towards restitution in this case. Petitioner appealed this order to the United States Court of Appeals for the District of Columbia Circuit. The district court's decision was affirmed.

## **B. Statement of Facts**

While in the custody of the Bureau of Prisons, Mr. Baxter received inadequate medical care, in that he was not permitted to see a urologist for nearly two years after onset of symptoms for Peyronie's Disease<sup>1</sup>; he suffered damages from this negligence. He filed suit in the Eastern District of Virginia against the United States, after his release, for medical malpractice, intentional infliction of emotional distress and negligent infliction of emotional distress.

Prior to settlement, Mr. Baxter's *pro bono* counsel moved *in limine* for a ruling as to whether the United States may withhold any sum to be paid to Mr. Baxter in connection with the case and apply it to his outstanding debt in the

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<sup>1</sup>"Peyronie's disease is a disorder in which scar tissue, called a plaque, forms in the penis—the male organ used for urination and sex. The plaque builds up inside the tissues of a thick, elastic membrane called the tunica albuginea. The most common area for the plaque is on the top or bottom of the penis. As the plaque builds up, the penis will curve or bend, which can cause painful erections. Curves in the penis can make sexual intercourse painful, difficult, or impossible. Peyronie's disease begins with inflammation, or swelling, which can become a hard scar. The plaque that develops in Peyronie's disease is not the same plaque that can develop in a person's arteries. The plaque seen in Peyronie's disease is benign, or noncancerous, and is not a tumor. Peyronie's disease is not contagious or caused by any known transmittable disease. Some men with Peyronie's disease may have impotence or erectile dysfunction. Usually men with Peyronie's disease are referred to a urologist—a doctor who specializes in sexual and urinary problems." *Penile Curvature (Peyronie's Disease)*, <https://www.niddk.nih.gov/health-information/urologic-diseases/penile-curvature-peyronies-disease> (last accessed 7/18/2019).

criminal matter. This motion was denied without prejudice. After the court granted in the motion for summary judgment in part, the parties settled the matter.<sup>2</sup> In the civil matter, the United States elected to forgo its opportunity to seek an order from the court that the amount paid in settlement of the instant action should be applied in partial satisfaction of the criminal restitution judgment.

Mr. Baxter reported the anticipated settlement to his probation officer and to the Office of the United States Attorney for the District of Columbia directly in a personal financial statement in July 2017.<sup>3</sup>

Mr. Baxter had started making payments towards the assessment and restitution while he was incarcerated and continued on his release. Mr. Baxter was released from custody on May 8, 2015 and started his period of supervised release on that date. Mr. Baxter completed his 900 hours of community release by the end of March 2017, in less than 2 years since his release from custody. He served the community by providing mentoring at Community Family Life Services in the Family2Family Mentoring Program and by doing tax filings for the elderly in the AARP Foundation Tax-Aide Volunteer Income Tax Preparation Program.

As of July 2017, Mr. Baxter had paid the \$2,100 special assessments as well as \$10,556.07 towards restitution. Mr. Baxter was continuing to pay \$300 per month. \$198.60 was taken out of his social security check by the U.S. Treasury, for which he paid a monthly \$15 fee, and in addition, he paid \$117 each month to the

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<sup>2</sup> The remaining issue was whether the failure of BOP healthcare professionals to diagnose the Peyronie's Disease deviated from the applicable standard of care and what damages, if any, petitioner was entitled to recover for any resulting mental distress.

Clerk of the Court. He was therefore paying 22.7% of his personal monthly income towards restitution.

While the Washington Teachers' Union never claimed to know Mr. Baxter's financial situation, in its motion it claimed that the settlement was a "material" change from Mr. Baxter's economic circumstances at the time of sentencing.

In fact, his financial situation had materially deteriorated since sentencing. Mr. Baxter's net worth at the time of sentencing was \$1,601.00 and his family's monthly expenses exceeded their monthly income by approximately \$7,685.00. PSI ¶99. As reported in his financial statement to the United States in July 2017, his house has significantly lost value and the mortgage balance then exceeded the current value of the house, so his net worth had turned negative since sentencing. Both his social security payments and his wife's pay are garnished for other debts.<sup>4</sup>

After the funds were initially seized by the U.S. Treasury, the funds were ultimately provided to his *pro bono* civil counsel's law firm, deposited in that firm's escrow account, and the funds then transferred, minus expenses, to undersigned counsel's escrow account and then, based on the district court's erroneous oral order granting the WTU's motion, paid to the District Court.

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<sup>3</sup>While the affidavit was not filed with the district court, this fact was not disputed.

<sup>4</sup>He and his wife are now divorced.

## REASONS FOR GRANTING THE WRIT

### THE D.C. CIRCUIT DECISION ERRONEOUSLY AFFIRMED THE MOTION FOR ADJUSTMENT OF THE RESTITUTION PAYMENT SCHEDULE AFTER PETITIONER WAS COMPENSATED FOR THE MEDICAL NEGLIGENCE DURING HIS TERM OF IMPRISONMENT

The D.C. Circuit held that district court did not err in concluding that appellant's receipt of \$40,000 as part of a settlement agreement constituted a material change in his economic circumstances that justified requiring appellant to pay \$36,000 toward his outstanding restitution obligations, citing to *United States v. Simpson-El*, 856 F.3d 1295, 1296 (10th Cir. 2017). Neither the circuit or the district court provided explanation for this analysis, when his actual financial worth had deteriorated since sentencing and 22% of his retirement income was already paid towards the restitution.

Although restitution has deep common law roots, it was only in the Victim and Witness Protection Act of 1982, (“VWPA”) Pub. L. No. 97–291, 96 Stat. 1248 (1982), “that Congress first gave the federal district courts general statutory authority to order restitution as part of a criminal sentence outside of the probation context.” *United States v. Amato*, 540 F.3d 153, 159 (2d Cir.2008); *see* S.Rep. No. 97–532, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536.

Thirteen years later, Congress passed the Mandatory Victims Restitution Act of 1996 (“MVRA”) as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, Title II, Subtitle A, 110 Stat. 1214. The legislation's stated purpose was to ensure that offenders realized the damage they caused with their criminal actions and make the victims whole. *See* S. Rep. 104–179, at 12

(1995), *reprinted in* 1996 U.S.C.C.A.N. 924; *see also* *Dolan v. United States*, 560 U.S. 605, 130 S.Ct. 2533, 2539, 177 L.Ed.2d 108 (2010) (noting that the MVRA “seeks primarily to assure that victims of a crime receive full restitution”). The MVRA also served to “replace an existing patchwork of different rules governing orders of restitution under various Federal criminal statutes with one consistent procedure.” S. Rep. 104–179, at 12 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924.

Under the MVRA, for any defendant convicted of certain enumerated offense categories, the sentencing court is required to order the defendant to pay restitution in accordance with 18 U.S.C. § 3664. *See* 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii), (d). A sentencing court must “order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.” *Id.* § 3664(f)(1)(A). However, upon determining the total restitution amount owed to each victim, the district court must, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

- (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
- (B) projected earnings and other income of the defendant; and
- (C) any financial obligations of the defendant; including obligations to dependents.

§ 3664(f)(2). If the restitution order requires payment over time, the time must be “the shortest ... in which full payment can reasonably be made.” § 3572(d)(2).

The MVRA authorizes the modification of the restitution payment schedule only upon a finding by the court of a “material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution.” 18 U.S.C. § 3664(k); *see United States v. Cani*, 331 F.3d 1210, 1215 (11th Cir. 2003)(explaining that district court can modify restitution payment schedule when there is a “*bona fide* change in the defendant's financial condition”). With this limitation, Congress ensured that the rate at which a defendant would be obligated to pay restitution would remain tethered to the most current information regarding ability to pay. To be sure, the MVRA enables the district court to modify a restitution order to reflect subsequent losses discovered by the victim, *see* 18 U.S.C. § 3664(d)(5), or a *bona fide* change in the defendant's financial condition, *either* positive or negative. *See* 18 U.S.C. § 3664(k).

The district court did not analyze Mr. Baxter's economic circumstances.<sup>5</sup> The settlement was not a “material” change from Mr. Baxter's economic circumstances at the time of sentencing. *See United States v. Grant*, 715 F.3d 552, 555-6 (4th Cir. 2013)(error for the district court to modify a restitution order by requiring the defendant to apply all of her income tax refunds toward restitution, without considering whether those refunds constituted a material change under § 3664(k); the district court abused its discretion by amending the original sentence in the absence of evidence of the impact the amendment would have on Grant's ability to

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<sup>5</sup> A district court abuses its discretion when it acts arbitrarily or irrationally, fails to consider judicially recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.” *United States v. Delfino*, 510 F.3d 468, 470 (4th Cir.2007).

support herself and her family); *United States v. Cani*, 331 F.3d 1210, 1215 (11th Cir. 2003)(explaining that district court can modify restitution payment schedule when there is a “*bona fide* change in the defendant's financial condition”).

First, settlement of the tort claims was intended to restore Mr. Baxter to the *status quo* for the mental anguish that he suffered from the medical negligence by the United States. This did not result in any financial change that should result in him having to pay this compensation for his anguish to the Washington Teachers' Union. To follow the WTU's argument to its logical conclusion, such seizure would defeat the purpose of the Federal Tort Claim Act, which is to restore a person injured through government negligence to the *status quo ante*.<sup>6</sup>

Second, like *Grant*, here, in fact, there was no material positive change to petitioner's financial situation. In fact, petitioner's financial situation had materially deteriorated since sentencing. There was a material negative change in his financial situation and his net worth was negative. He was already paying over 22% of his retirement benefit towards restitution and his family was unable to meet their expenses.

The district court abused its discretion when failing to consider Mr. Baxter's financial circumstances and the Circuit blindly stamped this without considering his circumstances as well, unlike other circuits which have applied the appropriate analysis under the statute.

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<sup>6</sup> The Internal Revenue Code also treats the settlement as non-income.

## CONCLUSION

The Court should grant certiorari to review this issue. The Court should reverse the Circuit's determination and remand this matter to the District Court to vacate the order and return the funds to Mr. Baxter.

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing were sent by electronic mail, to:

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on this 19<sup>th</sup> day of July, 2019.

/s/

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Jenifer Wicks

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CR No. 03-516-1
	)	
vs.	)	Washington, D.C.
	)	May 3, 2018
JAMES ODELL BAXTER, II, et al.	)	4:54 p.m.
	)	
Defendant.	)	
	)	

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TRANSCRIPT OF STATUS HEARING  
BEFORE THE HONORABLE RICHARD J. LEON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

## 1 P R O C E E D I N G S

2 COURTROOM DEPUTY: All rise. This Honorable Court  
3 is now in session, the Honorable Judge Richard J. Leon  
4 presiding. God save the United States and this Honorable  
5 Court. Please be seated and come to order.

6 Your Honor, this afternoon we have Criminal Case  
7 No. 03-516-1, the United States of America v. James Odell  
8 Baxter, Jr.

9 Mr. Baxter is present in the courtroom,  
10 Your Honor.

11 The Probation Officers present for these  
12 proceedings are Mr. McClellan and Mr. Hughes.

13 Will counsel for the parties please approach the  
14 lectern and identify yourself for the record.

15 MR. GORMAN: Good afternoon, Your Honor. David  
16 Gorman on behalf of the United States.

17 THE COURT: Welcome.

18 MS. WICKS: Good afternoon, Your Honor.  
19 Jenifer Wicks on behalf of Mr. Baxter. And I apologize;  
20 I didn't get the chambers message until late this afternoon.

21 THE COURT: All right. Thank you.

22 All right, Counsel. Is there counsel here for  
23 Washington Teachers Union?

24 MS. KRIEGER: Yes, Your Honor.

25 THE COURT: Come on up.

1                   Enter an appearance. You have a motion pending  
2 before the Court.

3                   MS. KRIEGER: Thank you, Your Honor.

4                   Kathy Krieger of James & Hoffman for the  
5 Washington Teachers Union.

6                   THE COURT: All right.

7                   You can sit at the table, ma'am, if you'd like.

8                   All right. Probation, come on up.

9                   What's your status report for now, anyway?

10                  PROBATION OFFICER: Good afternoon, Your Honor.

11                  THE COURT: Good afternoon.

12                  PROBATION OFFICER: Mr. Baxter is currently being  
13 supervised in the District of Maryland. He has been  
14 complying with his supervision, and he has paid monthly  
15 payments in the amount of \$300 towards his restitution.

16                  To date, Mr. Baxter has paid -- has made a total  
17 amount payment of \$88,735 towards his restitution.

18                  THE COURT: How much?

19                  PROBATION OFFICER: \$88,735 towards his total  
20 restitution, towards the joint restitution.

21                  THE COURT: Is that just from him alone or is that  
22 from all three of the --

23                  PROBATION OFFICER: All three. That's the total.

24                  THE COURT: It's the total for all three  
25 defendants?

1 PROBATION OFFICER: Yes, sir. Remaining balance  
2 of \$4,150,750 remains.

3 THE COURT: All right.

4 Now, his supervision is scheduled to be completed  
5 on the 7th of the month; is that right?

6 | PROBATION OFFICER: Yes, sir.

7 THE COURT: All right.

8                   And under the statute, the Court cannot extend it;  
9 is that correct?

10 PROBATION OFFICER: That is correct.

11 THE COURT: But the U.S. Attorney's Office will  
12 continue to collect money towards the payment of his  
13 restitution, right?

14 PROBATION OFFICER: Yes, sir. The Financial  
15 Litigation Unit of the United States Attorney's Office has  
16 up to 20 years to collect the remaining balance of his  
17 restitution, and a payment agreement has already been placed  
18 in effect to commence on June 20th, 2018, and for him to pay  
19 \$300 a month by the 20th of each month.

20 THE COURT: What was that date again that you said  
21 it would start?

22 PROBATION OFFICER: It would start June 20th,  
23 2018.

24 THE COURT: All right. Now, as I understand it,  
25 Probation isn't familiar with the Teachers Union motion to

1       adjust his restitution payment; is that correct?

2                   PROBATION OFFICER: That is correct.

3                   THE COURT: All right. But as I also understand  
4       it, if the Court were to order him to pay some portion of  
5       what's left of that \$40,000 that he recovered, the Court  
6       could continue today's hearing for a brief period of time to  
7       ensure that that's actually occurred; is that right?

8                   PROBATION OFFICER: Yes, sir.

9                   THE COURT: Very good.

10                  All right. Thank you very much. I'll get back to  
11       you if I have any other questions.

12                  PROBATION OFFICER: Thank you, Your Honor.

13                  THE COURT: Let's hear from Government's counsel  
14       on the Teachers Union's motion to adjust restitution payment  
15       for the 40,000, which is being held in escrow, being held in  
16       escrow by his counsel's law firm. Apparently, there's  
17       something like 3,000 roughly that's due and owing to them.  
18       But that leaves somewhere in the order of \$37,000.

19                  What's the Government's thinking on that subject?

20                  MR. McDANIEL: Good afternoon, Your Honor.

21       Oliver McDaniel for the United States on this issue.

22                  THE COURT: Mr. McDaniel, welcome back.

23                  MR. McDANIEL: Thank you. Good to see the Court.

24                  Our position, Your Honor, as may have been  
25       evidenced from our notice, was we think he ought to be

1 paying. We believe that his financial circumstances are not  
2 so onerous that it wouldn't allow him to pay some, at least  
3 some portion of this figure in support of his quite  
4 substantial restitution obligation.

5 We think the law supports it, the 3664(k).  
6 Certainly when you think about the analysis of material  
7 change, it's certainly been a material change. And even  
8 though the Court does, in this circumstance, analyze the  
9 financial circumstances of the defendant here, we think his  
10 financial circumstances, as stated, are not so onerous that  
11 it wouldn't permit --

12 THE COURT: Now, under this arrangement that  
13 Probation was just pointing out, sir, Mr. McDaniel, the new  
14 payment plan will begin on June 20th of this year.

15 MR. McDANIEL: That's correct.

16 THE COURT: And how much a month will it be, at  
17 least initially, on that payment plan?

18 MR. McDANIEL: The same. \$300 a month, beginning  
19 on June 20, 2018.

20 THE COURT: Which comes out, roughly, to \$3600 a  
21 year. And obviously, at that rate, getting the 4.1 million  
22 is a long ways away.

23 MR. McDANIEL: It's going to be difficult, yes.

24 THE COURT: Almost impossible.

25 Depending upon his circumstances, would the Court

1 have any option to increase the 300 to a larger number down  
2 the road?

3 MR. McDANIEL: Your Honor, what we do is we look  
4 at his financial circumstances ourselves. We periodically  
5 get financial statements from him. We also can continue to  
6 do discovery. We look at his credit report.

7 We also run a number of other analyses to try to  
8 see if we can determine what's going on.

9 And based on that, we can, under the terms of the  
10 agreement, increase that monthly payment.

11 THE COURT: Okay.

12 MR. McDANIEL: We can also seek other mechanisms  
13 under the Federal Debt Collection Procedure Act --

14 THE COURT: Okay.

15 MR. McDANIEL: -- that would allow us to collect  
16 any amount that we see available.

17 THE COURT: Very good.

18 All right, Mr. McDaniel, thank you for your help.

19 MR. McDANIEL: Thank you, Your Honor.

20 THE COURT: I'll hear from the Teachers Union  
21 counsel. If you want to address the Court, it's up to you.

22 MS. KRIEGER: Your Honor, I think we've said  
23 everything we know and everything we can find out about our  
24 rights under the law. In our papers we haven't seen  
25 anything from Mr. Baxter's counsel that suggests that

1 there's any basis for him holding back any of this money.  
2 And so we appreciate the Court's paying close attention to  
3 the circumstances.

4                   As you pointed out, Your Honor, at \$3600 a year,  
5 even at the extended 20-year ability, that will not come  
6 close to paying the amount. And it would take almost that  
7 full amount of time to pay the \$40,000 that he currently has  
8 in hand. Rather than face the uncertainty in the future,  
9 we would ask the Court to order that all or most of it be  
10 paid toward restitution now.

11                  THE COURT: The balance is roughly 36,000 or  
12 33- --

13                  MS. KRIEGER: We have only the representation that  
14 there were roughly 3,000-and-some in expenses owed to his  
15 counsel, but we know nothing more of the circumstances than  
16 that.

17                  THE COURT: You have no reason to doubt that,  
18 do you?

19                  MS. KRIEGER: We don't. We don't contest that  
20 representation.

21                  THE COURT: All right. Thank you, ma'am.

22                  MS. KRIEGER: Thank you, Your Honor.

23                  THE COURT: I'll hear from Ms. Wicks.

24                  MS. WICKS: Thank you, Your Honor.

25                  THE COURT: You're welcome.

1                   MS. WICKS: Your Honor, as the United States is  
2 aware, Mr. Baxter continues to fill out financial statements  
3 for them. There's a significant amount of money that he  
4 owes to the IRS, which is being garnished from his Social  
5 Security check as well.

6                   As I indicated in our opposition, there's about a  
7 little over, I think, 22 percent of his monthly income that  
8 is paid towards the Washington Teachers Union judgment and  
9 the IRS.

10                  There has been a material change in his finances  
11 since the Court sentenced him, and his financial -- he has a  
12 negative net worth otherwise.

13                  So the problem is the -- for the reasons that we  
14 stated in the motion, we don't believe that the money that  
15 he received in the settlement should be deemed income. And,  
16 in fact, when offset against the huge negative net worth,  
17 while he could pay off debt, it doesn't change his monthly  
18 situation.

19                  He has, I think, been -- as the Court knows, he  
20 did the 900 hours of community service within the first two  
21 years, so exceeding the rate that the Court ordered him by  
22 50 percent.

23                  And he's made every effort to comply with what the  
24 United States Attorney's Office financial unit has been  
25 asking for him and paying the monthly payments. So he --

1                   THE COURT: How much of that 40,000 is owed to the  
2 law firm that represented him in that suit?

3                   MS. WICKS: The representation that the lawyer  
4 made to me was -- he didn't send me a bill, but it was a  
5 little bit over 3800.

6                   THE COURT: 3800?

7                   MS. WICKS: In expenses, yes.

8                   They represented him pro bono in the suit.

9                   THE COURT: I see.

10                  All right.

11                  Do you have anything else you'd like to add?

12                  MS. WICKS: No. For the reasons in our motion and  
13 because of Mr. Baxter's financial situation, his age, and  
14 the fact that he's retired, we would ask that the Court  
15 allow him to use those funds towards his other debts.

16                  THE COURT: Okay.

17                  MS. WICKS: Thank you.

18                  THE COURT: The Court has reviewed the pleadings  
19 and has decided to grant the Washington Teachers Union  
20 motion for an adjustment.

21                  The Court presided over the trial in this case and  
22 is particularly mindful of the enormity of the fraud  
23 involved here and the pain that that caused to people who  
24 were members of the Teachers Union in this city. This was a  
25 particularly egregious fraud case.

1                   At the time, it was considered one of the largest  
2 in many decades, frankly, here in the District of Columbia.  
3 It was a 12-week trial.

4                   The Government went to great burden and great  
5 expense to put on their case. They put on their case  
6 successfully.

7                   And it was a particularly heinous criminal set of  
8 actions by the defendant and the other two defendants, one  
9 of whom pled guilty and one of whom went to trial with him.

10                  So the Court believes that there has been a  
11 material change, as is required by law. And the Court feels  
12 it's necessary and fair that those monies not -- I'm going  
13 to use the representations that have been made and just  
14 round it off to 36,000. So the 36 of the 40,000 be paid  
15 over to -- in restitution to the victims in this case.

16                  The Court will, pursuant to the suggestion, and  
17 I think a good suggestion, I might add, by the  
18 Probation Office, I'll continue the hearing. There's a sum  
19 that's still outstanding in this case so that the Court  
20 retains jurisdiction.

21                  I'll continue the hearing for a couple of weeks to  
22 give Mr. Baxter the time, working with his counsel, to take  
23 the money out of escrow and settle his account with them for  
24 the 3800, roughly, and the balance of it to be transferred  
25 over to the Victims Fund as part of the restitution here and

1 give him full credit for that towards the restitution of --  
2 balance of the 4.1 million that's still outstanding in this  
3 case.

4 So I'll set it down for a hearing in two weeks.  
5 Hopefully, two weeks will be enough time to settle the  
6 account with the law firm and to have a check issued for  
7 36,000 and have the check paid out.

8 I'll set a hearing two weeks from now to ensure  
9 it's happened. And if there's any complications or  
10 problems, then I'll hear about them at that hearing. And  
11 hopefully, that won't be the case.

12 And if it's all been taken care of, then I won't  
13 need to have the hearing. I'll just -- you know, if I'm  
14 informed by the Government, with obvious notice to the  
15 defense, that the payment has occurred and that the  
16 Probation Office is aware of it and everyone is aware of it,  
17 then there won't be any need for me to have a follow-up  
18 hearing.

19 But I'm going to have a follow-up hearing on the  
20 books in the event I need to have a follow-up hearing to  
21 make sure that that 36,000 is transferred over to the  
22 Victims Fund for credit towards the 4.1 million that is  
23 still outstanding in this particular case.

24 John, what's two weeks from today look like in the  
25 afternoon?

1                   Fine.

2                   So I'll set it for two weeks from today. That's  
3 the 17th of May, Counsel, and I'll set it for 3:00.

4                   MS. WICKS: Your Honor, I'm actually unavailable  
5 on that date. I was wondering if we could look at Monday,  
6 the 21st.

7                   THE COURT: How's that look, John?

8                   Okay. Does that work for the Government?

9                   MR. GORMAN: Yes, Your Honor.

10                  THE COURT: Okay.

11                  MS. WICKS: Thank you, Your Honor.

12                  THE COURT: May 21st at 3:00 p.m.

13                  And, like I said before, if the Government  
14 receives proof that everything is taken care of, Probation's  
15 satisfied with that, then there won't be really a need to  
16 have a follow-up hearing. And then the Court's jurisdiction  
17 will lapse because the supervision will lapse on that  
18 occasion.

19                  But if there's a problem, we will be back here,  
20 and we'll deal with it at that time.

21                  But I think that should be enough time to get all  
22 this done. It's a relatively uncomplicated transaction.  
23 It's paying off a bill for a law firm and then getting a  
24 check cut for the balance of it that's in an escrow account  
25 somewhere.

1                   So any questions for the Government?

2                   MR. McDANIEL: No, Your Honor.

3                   THE COURT: Any questions for the defense?

4                   MS. WICKS: No. Thank you, your Honor.

5                   THE COURT: All right. We'll stand in recess.

6                   COURTROOM DEPUTY: All rise.

7                   This Honorable Court will stand in recess until

8                   the return of court.

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## C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: August 10, 2018 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 18-3031**

**September Term, 2018**

**1:03-cr-00516-RJL-1**

**Filed On:** February 19, 2019

United States of America,

Appellee

v.

James Odell Baxter, II,

Appellant

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Washington Teachers' Union,  
Intervenor

**BEFORE:** Henderson, Srinivasan, and Millett, Circuit Judges

**ORDER**

Upon consideration of the motions for summary affirmance, the opposition thereto, the replies, and the supplement to the government's reply, it is

**ORDERED** that the motions for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The Washington Teachers' Union was specifically authorized by statute to move for an adjustment of appellant's restitution schedule. See 18 U.S.C. § 3664(k) (permitting "any party, including the victim," to move the court to adjust a restitution payment schedule). Assuming without deciding that a de novo standard of review applies, the district court did not err in concluding that appellant's receipt of \$40,000 as part of a settlement agreement constituted a material change in his economic circumstances that justified requiring appellant to pay \$36,000 toward his outstanding restitution obligations. See United States v. Simpson-El, 856 F.3d 1295, 1296 (10th Cir. 2017).

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 18-3031**

**September Term, 2018**

The Clerk is directed to publish this order and to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

**Per Curiam**