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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

James R. Parker,

Defendant.

CR 10-0757–01-PHX-ROS

GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE STATEMENTS FROM SPECIAL AGENT'S REPORT

I. Overview.

Defense counsel has mentioned in pleadings and in discussions with the government an intent to elicit evidence of an isolated opinion expressed by IRS Special Agent Lisa Giovannelli in her original Special Agent's Report (SAR). This isolated comment in her SAR is inadmissible hearsay, improper opinion testimony, irrelevant, and unduly prejudicial. Eliciting this evidence also would open the door to what her opinion is today, since she has investigated the matter for 3½ more years since she wrote her original SAR. For these reasons, the government requests that the Court preclude defense counsel from mentioning or referencing the Agent's opinion in any opening statement or when questioning witnesses at trial.

II. Factual Background.

At issue are two sentences contained in the Original SAR, which was completed and submitted for review within the IRS and the Tax Division of the Department of Justice. On page 3 of the 22 pages of narrative, Agent Giovannelli wrote the following:

> Evidence presented in this report supports the recommendation to prosecute [JAMES] PARKER for attempted evasion of payment. The investigation disclosed insufficient evidence to support a recommendation to prosecute PARKER's spouse, Jacqueline R. Parker. Jacqueline is a homemaker and has no known involvement with PARKER's business or any other known incoming (sic) producing activity.

The excerpt was made in December 2008, when the Agent was evaluating a criminal prosecution against defendant James Parker for violations of 18 U.S.C. §7201 (Evasion of Payment). In a supplemental Special Agent Report, produced shortly before the June 2010 Indictment, a prosecution against co-defendant Jacqueline Parker was recommended for violations of 18 U.S.C. § 7206 (False Statement). Defendant Jacqueline Parker ultimately was indicted for two false statement counts (Counts 7 and 8), and was omitted from the tax evasion charges filed only against defendant James Parker in Counts 1-4 of the Indictment.

III. Legal Argument.

A. The Agent's Statements are Inadmissible Hearsay.

Fed. R. Evid. 801(d)(2) instructs that admissions by party-opponents are not hearsay. This rule of evidence, however, does not apply to law enforcement officers and/or case agents as they are not "party-opponents" or agents of the government for purposes of this rule.

In ***United States v. Santos***, 372 F.2d 177 (2d Cir. 1967), defendant was charged with assaulting a federal officer. He attempted to introduce a sworn affidavit written by a different federal agent in which the author claimed that someone other than the defendant caused the assault. The court rejected defendant's claim that this affidavit was admissible as a party-opponent admission, holding that federal agents in criminal cases are not subject to the usual rules governing party-opponent admissions.

> [I]nconsistent out-of-court statements or actions of a government agent said or done in the course of his employment take on quite a different probative character

> in a government criminal case from that which inconsistent out-of-court acts of agents acting within the scope of their employment generally take on at a trial. Though a government prosecution is an exemplification of the adversary process, nevertheless, when the Government prosecutes, it prosecutes on behalf of all the people of the United States; therefore all persons, whether law enforcement agents, government investigators, complaining prosecuting witnesses, or the like, who testify on behalf of the prosecution, and who, because of an employment relation or other personal interest in the outcome of the prosecution, may happen to be inseparably connected with the government side of the adversary process, stand in relation to the United States and in relation to the defendant no differently from persons unconnected with the effective development of or furtherance of the success of, the prosecution.

Id. at 180.

Applying this principle, the court concluded that "out-of-court statements made by a government agent in the course of the exercise of his authority and within the scope of that authority, which statements ***would*** be admissions binding upon an agent's principal in civil cases, are ***not*** so admissible here." ***Id***. (emphasis added). The court thus acknowledged that the defense tactic would have been successful if it had been attempted other than in a criminal prosecution. The court further acknowledged that this limitation may seem grossly unfair to defendants, the "discrimination is explained by the peculiar posture of the parties in a criminal prosecution—the only party on the government's side being the Government itself whose many agents are supposedly uninterested personally in the outcome of the trial and are historically unable to bind the sovereign." ***Id.*** Thus, the court concluded: "[t]hese statements are not admissible against the Government as evidentiary proof of the matter stated therein." ***Id.*** at 181.

In ***United States v. Kampiles***, 609 F.2d 1233 (7th Cir. 1979), defendant attempted to call a court reporter to testify that a CIA operative had once made a statement to him that was inconsistent with the Government's theory of guilt. The court noted that prior to the adoption of the Federal Rules of Evidence, admissions by government employees in criminal cases were viewed as outside the admissions exception to the hearsay rule. "Because the agents of the Government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign, their statements seem less the product of the adversary process and hence

less appropriately described as admissions of a party." ***Id.*** at 1246; ***see also, United States v. Prevatte***, 16 F.3d 767, 779 (7th Cir. 1994).

Several other courts have held that statements by police officers or other law enforcement officials are not admissible on an admissions theory as substantive evidence against the sovereign in a criminal prosecution: ***Lippay v. Christos***, 996 F.2d 1490, 1497-98 (3d Cir. 1993); ***United States v. Kapp***, 781 F.2d 1008, 1014 (3d Cir. 1986); ***United States v. Ylidiz***, 355 F.3d 80, 81 (2d Cir. 2004). ***United States v. Powers***, 467 F.2d 1089, 1095 (7th Cir.1972); ***United States v. Durrani***, 659 F.Supp. 1183, 1185 (D.Conn.1987).

Thus, Agent Giovannelli's isolated comment in her Original SAR is inadmissible hearsay.

B. <u>The Statement is Inadmissible Opinion Evidence</u>.

A statement by law enforcement about whether there is sufficient evidence to charge an individual is, at best, merely an opinion that probable cause might not exist to seek an Indictment for a specific charge. Under Fed. R. Evid. 704, if the Agent was deemed an expert, she could "not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Similarly, Rule 701 has very defined limitations on lay opinions, and requires that the opinion be based on the witness's perceptions, helpful to understanding the witness's testimony or determining a fact in issue, and not based on technical or specialized knowledge.

In this matter, should defendant attempt to introduce Agent Giovannelli's previous statement, such testimony would constitutes improper opinion evidence. When making the original statement contained in the SAR, Agent Giovannelli's opinion about Jacqueline Parker's involvement was based on her *expertise* as criminal investigator in a complex tax matter. Should Agent Giovannelli be called to testify as to her previous statement, she ultimately would be asked to give an opinion about whether *Jacqueline Parker* did or did not have the requisite "mental state or condition that constitutes an element of the crime charged." By itself, that would be improper opinion testimony *even if* the tax evasion charges considered in the Original SAR had been brought against Jacqueline Parker. Instead, after a Supplemental SAR was

prepared 1½ years later, Jacqueline Parker was ultimately charged only with making false statements in their joint Offers in Compromise. Since it would be disallowed opinion testimony in a trial involving Jacqueline Parker, it most certainly is improper opinion evidence in the upcoming trial of James Parker. The Agent's statements in the Original SAR have nothing to do with the prosecution of defendant James Parker for tax evasion and false statements.

The "lay opinion" route is equally unavailing. At best, the only "relevance" of such evidence is that the case agent believed in 2008, at the time that she drafted the first SAR, that there was insufficient evidence at that time to charge Jacqueline Parker with the crime of tax evasion, a crime to which she was never charged. Agent Giovanelli's opinion in 2008 should not be permitted because it is clearly "not helpful" in "determining a fact in issue." ***United States v. Hauert***, 40 F.3d 197, 202 (7th Cir.1994) ("While the district court's analysis was not as clear as we would have liked, we find no abuse of discretion, no clear error, in the preclusion of this lay opinion evidence under the circumstances of this case. We believe that by the nature of a tax protestor case, defendant's beliefs about the propriety of his filing returns and paying taxes, which are closely related to defendants knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances not present here. In this case, such testimony was not helpful to the jury."); ***Galbraith v. Hartford Fire Ins. Co.***, 464 F.2d 225, 227-228 (3d Cir. 1972) (the court held that a decision by a prosecutor not to charge a criminal offense is not admissible opinion evidence in a civil trial.).

Argued as either lay or expert opinion testimony, Agent Giovannelli's two-sentence thought process in 2008 is clearly improper opinion testimony in either trial, but especially in the trial of James Parker. He has absolutely no factual or legal standing whatsoever to seek to admit this information, especially as opinion testimony in his trial.

C. <u>The Statement is not Relevant or is Unduly Prejudicial</u>.

Fed. R. Evid. 401 defines "relevant evidence" as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." In this matter, the statement or opinion offered by Agent Giovannelli in her Original SAR has no relevance whatsoever in the trial against defendant James Parker. There is no "fact of consequence" that would be made more or less probable by its admission. It was simply the Agent's initial investigative thoughts as to Jacqueline Parker on the charges of tax evasion only. Those thoughts have no relevance to the actual charges brought against defendant James Parker.

Alternatively, eliciting this evidence in the trial of defendant James Parker would be unfairly prejudicial. Defendant is attempting to argue that the IRS treated his wife unfairly by indicting her on the charges of making a false statement in their joint Offers in Compromise. Defendant, thus, is attempting to unfairly impugn bad conduct or over zealousness on the part of the government.

Since the Agent's statements do not address Jacqueline Parker's culpability as to the counts she was actually charged with in this case, defendant James Parker is merely trying to confuse the jury about the scope and significance of what was said in the SAR. He wants unfairly to inflame the jury by disingenuously arguing that the Special Agent did not want to prosecute Jacqueline Parker for what she was actually charged with in this Indictment. As noted above, the Agent's statement has nothing to do with the actual charges brought against either James Parker or Jacqueline Parker, and would be elicited only to confuse, mislead, or prejudice the jury. As such, it should not be allowed into evidence.

D. Eliciting This Evidence Would Open the Door to What the Opinion of the Agent is Today - Some 3½ Years Later .

Should this Court permit defendant to elicit testimony as to Agent Giovanelli's 2008 opinion, the government submits that this will effectively allow the government to introduce testimony that Agent Giovannelli's opinion, in light of all of the evidence uncovered during the government's investigation, has evolved considerably since December 2008 with respect to Jacqueline Parker. Moreover, the government will elicit testimony that the original opinion was formed when the case agent was only evaluating the charge of Tax Evasion, in violation of 26 U.S.C. 7201, rather than False Statement, in violation of 26 U.S.C. 7206. It would seem

imprudent on many levels to open the door to what the Special Agent's opinion is about the evidence and charges in this case.

IV. Conclusion.

The Agent's isolated comment in her SAR is inadmissible hearsay, improper opinion testimony, irrelevant, and unduly prejudicial. Eliciting this evidence also would open the door to what her opinion is today, which would not be a prudent course of conduct by either defendant to do. For these reasons, the government requests that the Court preclude defense counsel from mentioning this fact in opening statement or when questioning the witnesses at trial.

Respectfully submitted this 17th day of May, 2012.

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I hereby certify that on this date, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: Michael Minns, Ashley Arnett, Michael Kimerer, John McBee, and Joy Bertrand