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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,
Plaintiff,

-VS-

JERRY M.,
Defendant

CR. No. 07-XXX-AA-03

MOTION IN LIMINE REGARDING
OPINION EVIDENCE

Defendant Jerry M., by and through his counsel Terri Wood, moves the Court *in limine* for an Order instructing the Government, its representatives, and its witnesses to refrain absolutely from making any reference whatsoever, in person, by counsel or through witnesses or exhibits, during the Government's case-in-chief, cross-examination of defense witnesses, or during its rebuttal, to the following matters: (1) referring to the trusts utilized by the M.s or C.s as "sham trusts" or "abusive trusts," or as appearing to be or being similar to "sham trusts" or "abusive trusts"; (2) referring to the M.s or C.s as "tax protestors," or as appearing to be or being similar to "tax protestors"; (3) referring to the M.s' or C.s' correspondence with the IRS as "tax

protest” correspondence or as appearing to be or being similar to “tax protest” literature; and (4) expressing opinions about the common tactics or methods used by “tax protestors” in seeking to evade payment and assessment of taxes.

The defense so moves because such evidence or argument would be irrelevant, FRE 401 & 402; unduly prejudicial, FRE 403; improper character evidence, FRE 404(a); improper attack on the credibility of a witness, see FRE 608, 609 & 610; improper lay or expert opinion, FRE 701-704; in violation of Mr. M.’s rights of freedom of belief, speech, religion and to petition government under the First Amendment to the United States Constitution; in violation to his right to a fair trial as guaranteed by the Due Process clause of the Fifth Amendment to the United States Constitution; and in violation of Rule 16(a)(1)(G), F.R.Cr.P., absent additional timely discovery by the government.

The defense also moves for a hearing outside the presence of the jury prior to admission of any “expert” opinion by IRS agents or employees on the matters set forth above. FRE 104; *see*, FRE 701 (lay witness may not give opinions based on technical or other specialized knowledge); FRE 702 (foundation required for expert testimony); *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137 (1999).

This Motion is made in good faith and not for the purpose of delay. It is supported by the Points and Authorities that follow, and by such other grounds and authorities as may be offered at hearing on this motion or throughout the course of trial.

DATED this 22nd day of November 2009.

/s/ Terri Wood

TERRI WOOD, OSB #88332
Attorney for Defendant Jerry M.

POINTS AND AUTHORITIES

1. To be relevant, the evidence must tend to prove a fact of consequence to the action. FRE 401. It is fair to assume that the government has set forth at least the vast majority of the alleged facts of consequence to proving its case in the 23-page indictment. Significantly, nowhere in the indictment is it alleged that the trusts were “sham” or “abusive” trusts; nor is it alleged that the M.s or C.s were “tax protestors,” or that their correspondence with the IRS was “tax protest” literature. It is therefore difficult to see why, if these incriminatory characterizations were unnecessary to describe the acts giving rise to the charges, those characterizations are necessary to prove a fact of consequence to the jury.

2. Examining the indictment also reveals that M.’s correspondence with the IRS is not alleged as an act of evasion of payment or assessment of taxes, in any of those counts. The only allegations of correspondence with the IRS are as one or two of the 32 overt acts of the conspiracy count. The minor role of the evidence of his correspondence in proving any of the counts against him goes to the weighing process the Court must engage in if it finds the “tax protestor” testimony to be relevant, and otherwise admissible.

3. In its trial brief, the government has not relied on the M.s and C.s correspondence with the IRS in outlining its evidence to show the use of “deceitful or dishonest means” in impeding and impairing the IRS. See p. 5. Rather, the government argues that their “tax protestor materials” are admissible to show willfulness. See p. 11, government’s trial brief. Mr. M. has not objected to the government’s use of his correspondence with the IRS as evidence at trial. Mr. M. does not object to testimony by whomever at the IRS who received and read his correspondence that it sounded harassing or frivolous, and was unresponsive to the agency’s requests for information. See FRE 602 (personal knowledge required); government’s trial brief, p.2

(“Defendant sent the IRS frivolous and harassing correspondence, claiming among other things, that he was not subject to federal income tax laws.”). Mr. M. simply submits that the government not present “expert” testimony that characterizes—or is relevant only to infer—his acts as those of an illegal tax protestor, or his trusts as shams. The prejudicial impact of this opinion evidence outweighs its marginal contribution to proving any fact of consequence. FRE 403.

4. The government’s trial brief tells us that “tax protestors” are described as individuals who engage in certain behaviors, i.e., “refuse to file income tax returns and submit documents” that challenge the authority of the IRS, p. 11 n.2. A pattern of behavior is character evidence. FRE 404 does not permit the use of this type of character evidence against Mr. M.. *See, United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990)(“if the government presents expert opinion about the behavior of a particular class of persons, for the opinion to have any relevance, [the government] must lay a foundation which shows the [defendant] is a member of the class”).

5. Testimony that Mr. M.s’ behaviors were the same as or consistent with those of tax protestors is not admissible as lay opinion. *See, United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 “subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)”). Because such testimony is admissible only as expert testimony, and offered as an “inference as to whether the defendant did . . . have the mental state . . . constituting an element of the crime,” i.e., “willfulness,” it is inadmissible under FRE 704(b).

6. Surely a secondary purpose of applying the labels of “tax protestor” and “sham trusts” is to attack Mr. M.’s credibility and truthfulness. However, expert opinion that explains his behavior in guilt-prone terms is not a proper method of impeachment. See Rules 608 through 610.

7. The defense recognizes that the Ninth Circuit has long allowed law enforcement officers to testify regarding the “modus operandi” of drug traffickers or other criminals. The government will most likely contend that all tax protestors are criminals, i.e., willfully violate their known legal duties under the Internal Revenue Code. This is too simplistic an approach when protest through speech and petitioning government—the “modus operandi” of “tax protestors”—is protected by the First Amendment. Those acts are not criminal; willfully filing no return is criminal; willfully evading taxes is criminal. It is therefore highly suspect whether Mr. M.s’ correspondence with the IRS, even if similar to what other individuals have sent to the IRS, and those other individuals are what the government calls “tax protestors” is “modus operandi” evidence akin to what the Ninth Circuit has allowed in other cases. The law regarding the First Amendment, set forth in Mr. M.’s trial memorandum, is incorporated by reference herein.

8. The government defines “tax protestor” as people who refuse to file tax returns, among other acts of defiance. Mr. M. filed tax returns for 1995 and 1996, two of the five years alleged for tax evasion. He later developed a religious belief system, and made a faith-based (mis)interpretation of his obligations under the tax laws. He then filed “zero” returns for the remainder of the years alleged for tax evasion in the indictment. Appeals to religious prejudice, including disparaging Mr. M.’s faith by labeling him a “tax protestor,” would be not only improper under the rules of evidence, but also violate his Fifth Amendment right to a fair trial. *See also, United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000).

9. The defense reserves the right to make additional arguments in support of this motion once the government complies with its Rule 16 obligation for discovery of expert witnesses.

DATED this 22nd day of November, 2009.

/s/ Terri Wood
Terri Wood, OSB 88332
Attorney for Jerry M.

Certificate of Service

I hereby certify that on November 22, 2009, Defendant's Motion In Limine was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

/s/ Terri Wood
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