Terri Wood, OSB #88332
Law Office of Terri Wood, P.C.
730 Van Buren Street
Eugene, Oregon 97402
541-484-4171
Fax: 541-485-5923
Email: twood@callatg.com

Attorney for Jerry M.

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 DEFENDANT'S OBJECTIONS TO GOVERNMENT'S EXHIBITS

Defendant Jerry M., by and through his counsel Terri Wood, hereby submits such objections to the Government's Exhibits as he can presently make, outside the context of the trial. The Government has not yet provided Exhibits 9-100 or 9-101. The defense reserves all objections to those undisclosed exhibits, and reserves the right to raise additional grounds for objection to any other government exhibits as may appear appropriate prior to or during the trial.

Particularized objections are summarized on the attached Chart. The following memorandum addresses the legal grounds for Mr. M.'s objections.

Memorandum of Law

Irrelevant Evidence Inadmissible

FRE 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FRE 401 defines "relevant evidence" to mean "evidence 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."

Mr. M. has objected to exhibits that concern only the C.s, or their corporation, BAS, in which Mr. M. had no ownership interest nor held any corporate office, as being irrelevant to the charges against him. Granted, the charges include a conspiracy count involving the C.s and BAS; however, the conspiracy count appears to be the vehicle for the overwhelming majority of the government's exhibits for this trial. Indeed, of the 171 separate exhibits provided by the government thus far, only 58 pertain to Mr. M., while the remaining 112 pertain solely to the C.s or BAS.

As the proponent of the evidence, the government is required to establish the relevancy of each exhibit challenged on this ground by the defense; Mr. M. is not required to speculate or guess.

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, Waste of Time

FRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Advisory Committee Notes to this Rule explain:

> The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. . . . "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

If the government demonstrates its 112 exhibits (provided thus far) that pertain solely to the C.s or BAS are relevant, and if admissible over hearsay and related objections, the Court must finally determine whether the exhibits should be admitted over Mr. M.'s 403 objections. Assuming, *arguendo,* that all 112 exhibits have some tendency to prove an element of the conspiracy count against Mr. M., the Court should note—as the government points out in its trial memorandum—that only 1 overt act is needed to prove the conspiracy count, and that overt act need not even be one of the 32 separate overt acts alleged in the indictment. While the Court may not preclude the government from seeking to prove all 32 overt acts, the Court may determine whether any or all of the contested exhibits are necessary as part of its proof, when balanced against the 403 factors.

The government has listed both C.s as witnesses. Assuming, *arguendo*, that they waive their Fifth Amendment rights and testify at trial, many of these exhibits may be cumulative of their testimony; or, alternatively, the C.s' activities that the government seeks to prove through these exhibits are likely to become a trial within a trial, and both a waste of time and likely to confuse the issues and mislead the jury. *See also*, FRE 611(a)(2)(court shall exercise reasonable control over the mode and order of presenting evidence to avoid needless consumption of time).

If the C.s exercise their constitutional right to not testify, their credibility as hearsay declarants still presents the likelihood of a trial within a trial. *See,* FRE 806; *Wright & Graham*, 30B Fed. Prac. & Proc. Evid. §7090 (3d ed.) ("The credibility of a declarant of a hearsay

statement or of a statement defined as not hearsay under either Rule 801(d)(2), (C), (D), or (E) may be attacked by any evidence which would be admissible for that purpose if the declarant had testified as a witness. Thus a declarant's bias, interest, coercion, or corruption, evidence of character and conduct or his inconsistent statements may be shown or bearing on truthfulness. Similarly if the declarant's credibility has been attacked, it may be rehabilitated to the same extent as if he were a witness").

Opinion Evidence

FRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FRE 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The proponent of hearsay evidence admissible under Rules 803 or 804 that contains a declarant's opinions must overcome objections based on these rules governing admissibility of opinion evidence. *See,* FRE 803, Advisory Committee Notes (1972 Proposed Rules)("In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge"); *Wright & Graham*, 30 Fed. Prac. & Proc. Evid. §6338 (3d ed.)("Since Rules 701 and 702 limit the ability of a "witness" to express an opinion, it would seem that the Advisory Committee's Note to Rule 803 would make these

rules applicable to hearsay declarants. This seems to have been the common-law rule"); *United State v. Licavoli*, 604 F2d 613, 622-23 (9th Cir. 1979)(defense may raise an FRE 702 challenge to hearsay opinions contained in record otherwise admissible under FRE 803(6), the business records exception); *United States v. Zang,* 703 F2d 1186, 1195-96 (10th Cir. 1982)(letter containing the corporation's interpretation of the regulations relevant to defendant's intent; court excluded part of the letter constituting a legal opinion, but admitted the factual portions, finding expert opinion should not be allowed to escape cross-examination in the guise of a business record).

Mr. M. has objected to all IRS Form 4340s—"Certificate of Assessments, Payments and Other Specified Matters"—in part because these records are a summary of the opinions of IRS agents allegedly with specialized knowledge concerning "adjusted gross income," "taxable income," and resulting tax deficiencies, which is an element of the crimes charged against him. The government should be required to call witnesses to testify as to how these opinions were reached, including the IRS agents who audited the M. returns, rather than be allowed to rely on hearsay. For similar reasons, these records also fail to satisfy the requirements of FRE 803(8), as further set forth below.

Mr. M. has objected to all IRS tax returns, other than those he personally prepared or adopted by his signature, in part because these records express either the lay or expert opinions of the preparers in terms of the classification of items as income or expense, as well as the adjusted gross income and taxable income.

Mr. M. has raised objections under FRE 701 & 702 as to other exhibits specified on the attached Chart, as to other documents or records containing statements expressing the opinions of declarants.

Admission By Party-Opponent

FRE 801(d)(2) provides:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Mr. M. has objected to most of the government's exhibits that contain statements by the C.s as being inadmissible under this section, in the absence of the government meeting its burden of showing the exhibits satisfy the applicable criteria. It is most likely that the government will seek to rely on subsection (E), the co-conspirator exception. Mr. M. has previously filed a Motion in Limine against statements by the C.s and others, such as Daniel Carvalho or Jerry Wallace, that sets forth the analytical framework. The points and authorities in that motion in limine, 7 pages in length, are incorporated by reference herein.

Hearsay Generally Not Admissible

FRE 802 provides: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Mr. M. has raised an FRE 802 objection as a general objection to admissibility of many of the government's exhibits, in the event that the government claims it is not offering the exhibit under the particular hearsay exceptions identified by the defense as a basis for objection.

Records of Regularly Conducted Business Activity

FRE 803(6) provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Mr. M. has objected to the Mountain High Gold Records, the BAS Profit and Loss compilations, and the Form W-2s based in part on the failure of these exhibits to satisfy the requirements of FRE 803(6).

The Public Records Hearsay Exception

FRE 803(8) provides:

> Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. (Emphasis supplied).

Records of a government agency, including the IRS, are admissible only under 803(8), and not under the general business records exception, FRE 803(10). See, e.g., *United States v. Weiland*, 420 F3d 1062, 1074 (9th Cir. 2005); *United States v. Orellana-Blanco*, 294 F3d 1143,

1149 (9th Cir. 2002). IRS records setting forth factual findings from an investigation the agency is authorized to conduct do not satisfy this hearsay exception unless offered by Mr. M. against the Government. “Reports based on study or analysis of data seems inappropriate for clause B and are better suited to clause C as investigative in nature.” *Mueller & Kirkpatrick*, Federal Evidence (3rd Ed. 2007), Vol. 4, p. 782.

The Ninth Circuit long ago approved admissibility of IRS certificates establishing no returns had been filed nor payment made by a taxpayer in a criminal case, against a FRE 803(8)(C) challenge and Confrontation Clause challenge. *United States v. Neff*, 615 F.2d 1235, 1241-43 (9th Cir. 1980). The Court found this type of IRS certificate admissible because it “was the product of systematized data storage and retrieval by a public agency charged with the responsibility of maintaining accurate financial and tax information. Its admission into evidence involved no risk of faulty human recollection and little likelihood of misrepresentation of significant data.” *Id.*

Neff thus distinguished between factual findings based on study or analysis of data by IRS agents, which are not admissible against a criminal defendant under 803(8)(C), and factual findings based on “systematized data storage and retrieval.”

The Court also recognized that the Confrontation Clause issue was distinct from whether the document was admissible as a public record under the evidence code: “In order to rule that Neff's Sixth Amendment right to confront adverse witnesses was not violated by admission of the IRS document we must be convinced that the document was reliable, for ‘the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that ‘the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement.’ ” Id., at 1242 (citations omitted).

The Certificates of Assessment, Payment and Other Specified Matters that Mr. M. objects to set forth the agency's conclusions as to the amount of tax deficiency, which are derived from audits undertaken for potential civil and criminal prosecution. These records fall within the prohibition of 803(8)(C), as well as run afoul of Mr. M.'s Confrontation Clause rights. See, *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978). That Court explained, at 356:

> Upon the basis of an exhaustive canvass of the legislative history underlying the hearsay rules in general and the hearsay exceptions set forth in Fed.R.Evid. 803(8)(B) and (C) in particular, we held in *United States v. Oates, supra*, 560 F.2d at 84, that, despite the fact that particular public records or reports may appear to satisfy the standards of one of the numerous hearsay exceptions set forth in the Federal Rules of Evidence, "in criminal cases (records,) reports (,statements or data compilations, in any form,) of public (offices or) agencies setting forth matters observed by police officers and other law enforcement personnel . . . cannot satisfy the standards of any hearsay exception if those reports are sought to be introduced against the accused." In view of the broad reading which *Oates* accorded to the language "other law enforcement personnel," see 560 F.2d at 67-68 (Customs Service chemists found to qualify as "other law enforcement personnel"), there surely can be no question here that IRS personnel who gather data and information and commit that information to records which are routinely used in criminal prosecutions are performing what can legitimately be characterized as a law enforcement function. It thus follows that the printout which was introduced against Ruffin here was a record of a public agency setting forth matters observed by law enforcement personnel and, under our holding in *Oates*, that law enforcement record was inadmissible against Ruffin.

Mr. M. has objected to the IRS Notices Concerning Collection Actions (8-100, -101) that he and the C.s were sent because this documents expressly set forth the agency's factual findings and conclusions about tax deficiency, rendering them inadmissible under subsection (C).

Mr. M. has also objected to the admissibility of all tax returns not prepared or adopted by him through signature as not subject to the Public Records exception because those returns do not satisfy the requirements of 803(8)(A) or (B). Tax returns must be filed with the IRS, but

these records do not set forth the activities of the IRS, nor are they the recorded observations of the IRS.

Double Hearsay

FRE 805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

Mr. M. has objected under this provision to those government exhibits specified on the Chart, including the IRS Information Return Master File exhibits, that appear to be based on 1099s or other information submitted by third parties to the IRS, presumably based on the third parties' business records, which may not comply with FRE 803(6).

Sixth Amendment Confrontation Rights

In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the Supreme Court held the Sixth Amendment Confrontation Clause was violated by admitting certificates of chemical analysis sworn by forensic technicians against a criminal defendant, when the analysts did not testify. In so holding, the Court rejected arguments that the analysts' affidavits were not testimonial statements because of the records being akin to public records, based on neutral, scientific methods, and not authored by accusatory witnesses. *Melendez-Diaz* has ramifications on the admissibility of many of the government's exhibits in Mr. M.'s case.

First, the Supreme Court reiterated that the "core class of testimonial statements" subject to confrontation includes affidavits, prior testimony that the defendant was unable to cross-examine, and statements made under circumstances which would lead an objective witness

reasonably to believe that the statement would be available for use at a later trial. 129 S.Ct. at 2531-32.

Second, the Court reasoned that any testimonial statement that the prosecution sought to admit against a defendant falls within the ambit of the Confrontation Clause, rejecting arguments that the content of the statement needed to be accusatory or incriminating on its face. 129 SCt at 2533-34.

Third, the Court stressed that confrontation is one means of assuring accurate forensic analysis, id., at 2536-377. Financial analysts, including IRS fraud investigators, are no less deserving of scrutiny than scientific analysts.

Fourth, the Court clarified its statement in *Crawford v. Washington* that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records," 541 U.S. at 56, explaining: "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because--having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial--they are not testimonial." *Id.*, at 2539-40.

In Mr. M.'s case, the tax returns for the C.s', BAS corporation, and the C.s' trusts, are all sworn statements, and ones which an objective person would reasonably believe would be available for use at a trial should any dispute with the IRS arise within the statute of limitations. Unless the affiants for these tax returns are available for cross-examination at Mr. M.'s trial, these returns should not be admitted as evidence against him.

Although unsworn, the Certificates of Assessment and Payment, at least for every year starting with 1995, are based on IRS analysts' factual findings that the trusts used by the C.s and M.s were "sham trusts," and calculate tax deficiencies based on analysts' opinions of fraud by

the C.s and M.s, and as such are "statements which an objective person would reasonably believe would be available for use at a trial."

Neff's holding that IRS Certification of Lack of Records exhibits do not violate the Confrontation Clause is called into serious doubt by *Melendez-Diaz.* In rejecting the prosecution's claim that a certified drug analysis report was admissible over a Sixth Amendment objection as a public record, the Court observed, at 2539:

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition-it was prepared by a public officer in the regular course of his official duties-and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation.

The defense has objected to all Certification Lack of Record exhibits in order to preserve Mr. M.'s Sixth Amendment Confrontation rights.

In further support of his Sixth Amendment objections to exhibits, Mr. M. incorporates by reference herein the points and authorities set forth in his previously filed Motion in Limine regarding Co-conspirator Statements.

Should the government claim that the tax returns at issue are not subject to confrontation because not offered for the truth of the matters asserted, because the government takes the position that the returns are false, that claims bears closer scrutiny. In *Crawford v. Washington,* 541 US 36 (2004), the Supreme Court held that the prosecution may not introduce a declarant's out-of-court testimonial statement against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. At the same time, the Court noted an exception to this rule: Citing its 1985 decision in *Tennessee v. Street,* 471 US

409 (1985), the Court stated that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 US 59 n.9. However, if testimonial statements are admitted wholesale whenever the government employs that nonhearsay hook, that would eviscerate the constitutional right to confrontation. Thus, there must be restrictions on the use of non-truthful testimonial statements.

First, it is worth looking at the *Street* opinion and what it actually held. During Harvey Street's trial for murder, the prosecution introduced a confession that he had given to the police. Street contended that the confession was false, claiming that the police had extracted it from him by reading to him a confession that a Mr. Peele had given--which stated that Street and Peele committed the crime--and forcing him to repeat the same thing. In response, the state offered Peele's confession; not for the truth of the matter asserted (i.e., to prove that Street and Peele had committed the murder), but rather to show that Street's confession was materially different from Peele's and thus was not the product of the coercive tactics Street alleged. Even though Peele's confession directly inculpated Street and Peele did not testify at Street's trial, the Supreme Court upheld this use of Peele's confession.

Although *Street* contains some passages using reliability-based reasoning that is outdated in the post-*Crawford* world, its result remains sound: If out-of-court testimony is not being offered to prove the truth of the matter asserted, then the declarant is not--in the words of the Sixth Amendment--a "witness against" the defendant. While a person repeating another's prior statement in court to prove something other than the truth of the matter asserted--such as the fact that the person felt threatened when the speaker said "I'm going to kill you because you owe a drug debt"--is a witness against the defendant (and thus subject to the Confrontation Clause), the defendant has no need to cross-examine the speaker of the original statement to determine whether the person who repeated it actually felt threatened.

Still, *Street* did not hold, as a casual reading of the *Crawford* dicta might suggest, that anything goes when the prosecution posits a nonhearsay purpose for introducing an out-of-court

testimonial statement. The Court in *Street* emphasized that the nonhearsay use of Peele's confession was "critical" to rebut Street's testimony and that the jury was actually instructed not to consider the confession for the truth of the matter asserted. 471 US at 413. Furthermore, while the Court acknowledged that there was a risk that the jury "misused" Peele's confession by considering it for the truth of the matter asserted, the Court found that "there were no alternatives that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the improper use of evidence." Id. at 414-15. There was no way to redact or paraphrase Peele's confession without undercutting the prosecution's legitimate use of the confession.

Notwithstanding *Street's* careful reasoning, some courts have assumed, especially in the wake of *Crawford*, that the Confrontation Clause permits the prosecution to introduce any testimonial evidence whatsoever, so long as the prosecution can articulate a nonhearsay purpose for doing so. But it is critical to appreciate that *Street* does not go this far.

Street's constitutional framework still instructs that courts should allow the out-of-court accusations to be introduced only if two prerequisites are satisfied: First, this Court must find that the prosecution has a real and genuine need for introducing the evidence for the nonhearsay purpose. Second, even if the prosecution establishes a legitimate need to introduce testimonial evidence for some purpose other than the truth of the matter asserted, this Court cannot admit the full statement at issue unless it finds that the evidence cannot be redacted to blunt the risk of improper use while still accommodating the prosecution's legitimate need.

DATED this 20th day of November 2009.

/s/ Terri Wood
TERRI WOOD, OSB #88332
Attorney for Defendant Jerry M.

Certificate of Service

I hereby certify that on November 20, 2009, Defendant's Objections to Government Exhibits 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
Terri Wood, OSB # 88332
Attorney for Jerry M.