UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
at COVINGTON

CRIMINAL ACTION NO. 11-70-DCR

UNITED STATES OF AMERICA **PLAINTIFF**

V. **DEFENDANT'S MOTION IN LIMINE CONCERNING THE TRIAL TESTIMONY OF SPECIAL AGENT PALMISANO**

RONALD E. WEINLAND **DEFENDANT**

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May it please the Court, Defendant Ronald E. Weinland, through undersigned counsel, hereby moves the Court pursuant to Federal Rule of Evidence 403, 701, 702, 703, 802, 1006 and Federal Rule of Criminal Procedure 16, to exclude improper lay and expert opinion testimony from Special Agent Susan Palmisano and to bar SA Palmisano from presenting hearsay during her purported summary testimony. The United States has notified the Defendant of its intention to call SA Palmisano as a summary witness and has identified the scope of her anticipated trial testimony in its pre-trial disclosures. [A copy of an email from the United States to the undersigned counsel identifying SA Palmisano as a summary witness and describing SA Palmisano's anticipated trial testimony is attached hereto as Exhibit A.] As explained herein, much of SA Palmisano's anticipated trial testimony, as outlined by the United States, is not admissible through a summary witness and should be excluded from the trial of this action.

A. As a summary witness, SA Palmisano cannot offer the opinion testimony that the government has indicated that it intends to elicit.

The United States has stated its intention to call SA Palmisano as a summary witness. SA Palmisano has ***not*** been identified by the United States as an expert witness. Nonetheless, it

appears that the United States intends for SA Palmisano to testify outside the scope of a lay or summary witness and to present expert opinion testimony at trial. The Defendant respectfully requests an order in limine precluding SA Palmisano from offering improper lay opinion testimony under Fed. R. Evid. 701.[1]

As a general matter, a lay or fact witness may not testify about his or her opinion, except in specific circumstances. Federal Rule of Evidence 701 explains:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. The Federal Rules Advisory Committee notes define lay opinion testimony as "result[ing] from a process of reasoning familiar in everyday life," while expert opinion testimony "results from a process of reasoning which can be mastered only by specialists in the field." USCS Federal Rules of Evidence, Rule 701, Advisory Committee Notes to 2000 Amendment (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)).

Fed. R. Evid. 701 was amended in 2000 to specifically prohibit lay witnesses from offering opinion testimony that is based on scientific, technical, or other specialized knowledge. *See United States v. Ganier*, 468 F.3d 920, 927 (6th Cir. 2006). The Advisory Committee Notes relative to the 2000 amendment explain that "[t]he amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge . . . **is**

[1] In the event the United States attempts belatedly to convert SA Palmisano into an expert witness, the defense requests an order barring her testimony for failure to provide a timely notice under Fed. R. Crim. P. 16(a)(1)(G). If the Court were to permit the government to give late notice, the defense requests an opportunity to address by motion in limine any proposed expert testimony and to seek a *Daubert* hearing if necessary.

governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules." USCS Federal Rules of Evidence, Rule 701, Advisory Committee Notes to 2000 Amendment (emphasis added). However, "[e]ven before the 2000 amendment, witnesses who performed after-the-fact investigations were generally not allowed to apply specialized knowledge in giving lay testimony." *Ganier*, 468 F.3d at 927.

This limitation on lay witness opinion testimony under Rule 701 that the 2000 amendment made clear was reinforced by the Sixth Circuit in *United States v. White*, 492 F.3d 380 (6th Cir. 2007). In *White*, the defendants alleged that the district court had erred in permitting certain Medicare auditors with specialized knowledge of Medicare regulations and reimbursement procedures to testify as lay witnesses at trial. *See White*, 492 F.3d at 398. Although the government had failed to qualify the Medicare auditors as experts, the district court allowed the auditors to testify as lay witnesses at trial pursuant to Rule 701. *See Id.* at 399.

Recognizing that the Federal Rules of Evidence "distinguish between lay and expert testimony, not witnesses" (i.e., under Rules 701 and 702, a witness could offer lay testimony while at the same time be precluded from offering expert testimony), the court of appeals considered the testimony of the Medicare auditors. *Id.* at 403. The court of appeals found that because the "Medicare program operates within a complex and intricate regulatory scheme" the Medicare auditors' testimony "required them to apply knowledge and familiarity…well beyond that of the average lay person." *Id.*, quoting *United States v. Ganier*, 468 F.3d 920, 925 (6th Cir. 2006). The specialized and technical nature of the Medicare program's structure and procedures required the Medicare auditors to rely "to a significant degree on specialized knowledge acquired over years of experience as Medicare auditors…" *Id.* at 403-04. As a result, the "average lay person [was] incapable of making sense of the various exhibits which the [Medicare auditors]

helped to clarify and link together on the basis of the "reasoning process" employed daily in their highly specialized jobs." *Id.* at 404.

After reviewing precedent following the effective date of the 2000 amendment, the court of appeals concluded that lay opinion testimony "is improper where it encompasses opinions that 'call [] for specialized skill or expertise." *Id.* at 403 citing *Brown*, 836 S.W.2d at 550. Thus, the court of appeals determined that the district court had erred in permitting the Medicare auditors "to effectively testify as experts without first being qualified." *Id.*

Here, the United States has not identified SA Palmisano as an expert witness and has not complied with the corresponding disclosure requirements of the Federal Rules of Criminal Procedure and has not qualified SA Palmisano as a witness who can provide expert opinion testimony in this action. To the contrary, the government has clearly expressed its intention to use SA Palmisano as a summary witness. Nonetheless, the United States has also stated that it intends to have SA Palmisano testify as to her "analysis" of the credit card statements and the bank accounts of the Church and the Weinlands. *See* Exhibit A. The United States maintains that SA Palmisano reviewed the credit card statements of the Church and the Weinlands "to determine the total expenses and to identify the Weinland's personal expenses" and that she "also determined the personal expenses paid by the church directly, or by reimbursement to Mr. Weinland." *Id.* The United States maintains that SA Palmisano's "analyses of the accounts were provided in the Rule 16 discovery." *Id.* And further states that "the US may introduce SA Palmisano's ***analyses*** of the credit and bank accounts" at trial. *Id.*

The United States description of SA Palmisano's anticipated trial testimony clearly shows that the United States intends for SA Palmisano to testify as to her own determination of Church expenses and personal expenses. SA Palmisano's determination of whether expenses

should be characterized as either Church expenses or personal expenses is a legal determination based on her interpretation and application of relevant sections of the Internal Revenue Code, and the underlying Treasury regulations interpreting those sections. Therefore, it must be assumed that SA Palmisano's "***analyses*** of the credit and bank accounts" was based on some measure of specialized knowledge. Otherwise, the resulting testimony would be subject to exclusion under Fed. R. Evid. 701. *See United States v. Griffin*, 324 F.3d 330, 348 (5th Cir. 2003) (the court found that the district court erred in admitting testimony that consisted of the witness' "own interpretation of the law").

However, SA Palmisano's expert opinions are not admissible as lay testimony. *See White*, 492 F.3d at 404. In addition to the Sixth Circuit's clear decision in *White*, the Second Circuit's decision in *United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005) is also on point. In *Garcia*, a government agent offered lay opinions on the role of the defendant in a drug conspiracy. *See Garcia*, 413 F.3d at 209-17. The court of appeals found that the testimony satisfied none of the requirements for lay opinion under Rule 701: it was not "rationally based on the perception of the witness," but instead incorporated information that the agent had learned from others in the course of his investigation, *see id*. at 211-13; it was not "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue," *see id*. at 213-15; and it was based on specialized knowledge, rather than everyday reasoning processes, *see id*. at 215-17. The same is true of the testimony to be offered by SA Palmisano, and that testimony should be excluded from the trial of this action. To permit otherwise, is to allow the government to "surreptitiously circumvent[] the reliability requirements set forth in Rule 702…through the simple expedient of proffering an expert in lay witness clothing…." *White*, 492 F.3d at 400-01 (quotations omitted).

B. SA Palmisano cannot present expert opinion testimony as she has not been identified or qualified as an expert witness in this action.

As discussed above, it appears that the United States intends for SA Palmisano to testify outside the scope of a lay or summary witness and to present expert opinion testimony at trial. However, the United States has not complied with the expert disclosure requirements in relation to SA Palmisano's anticipated testimony under Fed. R. Crim. P. 16(a)(1)(G) and has not qualified SA Palmisano as an expert under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Such conduct violates the stated intention of the drafters of the 2000 amendment to Rule 701 to "ensure[] that a party will not evade the expert witness disclosure requirements set forth in…Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson." Fed R. Evid. 701, Advisory Committee Notes to 2000 Amendment. As a result, the Defendant respectfully requests an order in limine precluding SA Palmisano from offering expert opinion evidence for failure to provide a timely notice under Fed. R. Crim. P. 16(a)(1)(G). If the Court were to permit the government to give late notice, the defense requests to opportunity to address by motion in limine any proposed expert testimony and to seek a *Daubert* hearing if necessary.

C. SA Palmisano's summary testimony cannot be based on inadmissible hearsay.

In the event that the Court allows SA Palmisano to testify as a summary witness, she may present only a fair and accurate summary of the evidence that has been properly admitted at trial.[2] Summary evidence and testimony is admissible under Fed. R. Evid. 1006 only if the evidence the witness purports to summarize is admissible and the summary is accurate and nonprejudicial. *See, e.g., Auto Industries Supplier Employee Stock Ownership Plan v. Ford*

[2] Even if the government had properly noticed SA Palmisano as an expert pursuant to Fed. R. Crim. Pro. 16(a)(1)(g) (which it did not), the government would not be permitted to simply channel hearsay from Church members through SA Palmisano. *See* Fed. R. Evid. 703 and 403.

Motor Co., 435 Fed.Appx. 430, 448, 2011 WL 2610584, 18 (6th Cir. 2011)(setting out the requirements for summary evidence, including that "(3) the underlying documents must be admissible in evidence; (4) the summary must be accurate and nonprejudicial").

In other words, a Rule 1006 summary witness "is not a back-door vehicle for the introduction of evidence which is otherwise inadmissible." *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160 (11th Cir. 2004). *Accord United States v. King*, 616 F.2d 1034, 1041 (8th Cir.), *cert. denied*, 446 U.S. 969 (1980) ("The testimony of a summary witness may be received so long as she bases her summary on evidence received in the case and is available for cross-examination."); J. McLaughlin, J. Weinstein, & M. Berger, 6 Weinstein's Federal Evidence § 1006.03[3] (2d ed. 2004) ("Charts, summaries, and calculations are only admissible when based on original or duplicate materials that are themselves admissible evidence."); C.A. Wright & V.J. Gold, 31 Federal Practice and Procedure § 8043, at 527 (2000) ("Rule 1006 evidence may also be excluded where the source materials are inadmissible hearsay or even where just some parts of those materials are inadmissible hearsay.").

Rule 1006 does not permit the admission of summaries of the testimony of out-of-court witnesses because such testimony would be inadmissible hearsay. *See, e.g., United States v. Goss*, 650 F.2d 1336, 1344 n. 5 (5th Cir. 1981)(noting that "[a]lthough the Federal Rules of Evidence permit the admission of summaries of voluminous documentary evidence that cannot be conveniently examined in court . . . there is no provision for the admission of summaries of the testimony of out-of-court witnesses."); *United States v. Bray*, 139 F.3d 1104, 1109-1110 (6th Cir. 1998)("if the underlying documents are hearsay and not admissible under any exception, a chart or other summary based on those documents is likewise inadmissible"); *Martin v. Funtime, Inc.*, 963 F.2d 110, 116 (6th Cir. 1992)("'if the original materials contain hearsay and fail to

qualify as admissible evidence under one of the exceptions to the hearsay rule' the summary based on that material is inadmissible").

The "summary testimony" the United States intends to offer through SA Palmisano is based at least in part on inadmissible hearsay. According to the United States, "SA Palmisano interviewed members of the church, including Mr. Darlymple and Ms. Little to identify church expenditures made by the Weinlands and reimbursed by the Church." *See* Exhibit A. The United States has provided that SA Palmisano's analyses and testimony will be largely based on statements and information provided to her through these out-of-court interviews with individuals who had little, if any, personal knowledge of the actual transactions that SA Palmisano determined as being either Church expenses or personal expenses. Unless and until all of the evidence upon which SA Palmisano's summary testimony is based (including the out-of-court statements made by Mr. Darlymple, Ms. Little and other unidentified church members) is admitted into evidence at the trial of this action, SA Palmisano cannot present any summaries or opinions based on those statements. Such improper testimony is not only prohibited by law, but is also cautioned against in the relevant sections of the Internal Revenue Manual outlining general investigative procedures in criminal tax investigations. *See, e.g.,* Internal Revenue Manual, 9.5.1.14(4) (instructing that "[w]hen gathering evidence regarding a subject's expenditures, it is important to remember that the agent's testimony alone will not be sufficient. Rather, the government must be prepared to call third-party payees as witnesses or introduce other independent testimonial or documentary evidence to establish the purpose of the payments."). For this reason, the summary testimony offered by the United States through SA Palmisano is not admissible and should be excluded from trial.

For each of these reasons, the Court should enter an order excluding improper lay and expert opinion testimony from SA Palmisano and barring SA Palmisano from presenting hearsay during her purported summary testimony.

A proposed order is submitted herewith.

Respectfully submitted,

/s/ J. Christopher Coffman
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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012, I electronically filed this document with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to Robert K. McBride, Robert.McBride@usdoj.gov.

By: /s/ J. Christopher Coffman
J. CHRISTOPHER COFFMAN
Counsel for Ronald E. Weinland